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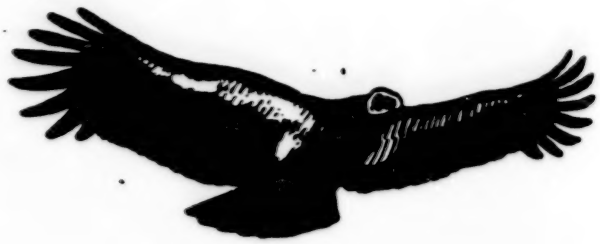

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ENDANGERED SPECIES CONSULTATION HANDBOOK

(730 FW 4A)

PROCEDURES FOR CONDUCTING

SECTION 7

CONSULTATIONS AND CONFERENCES

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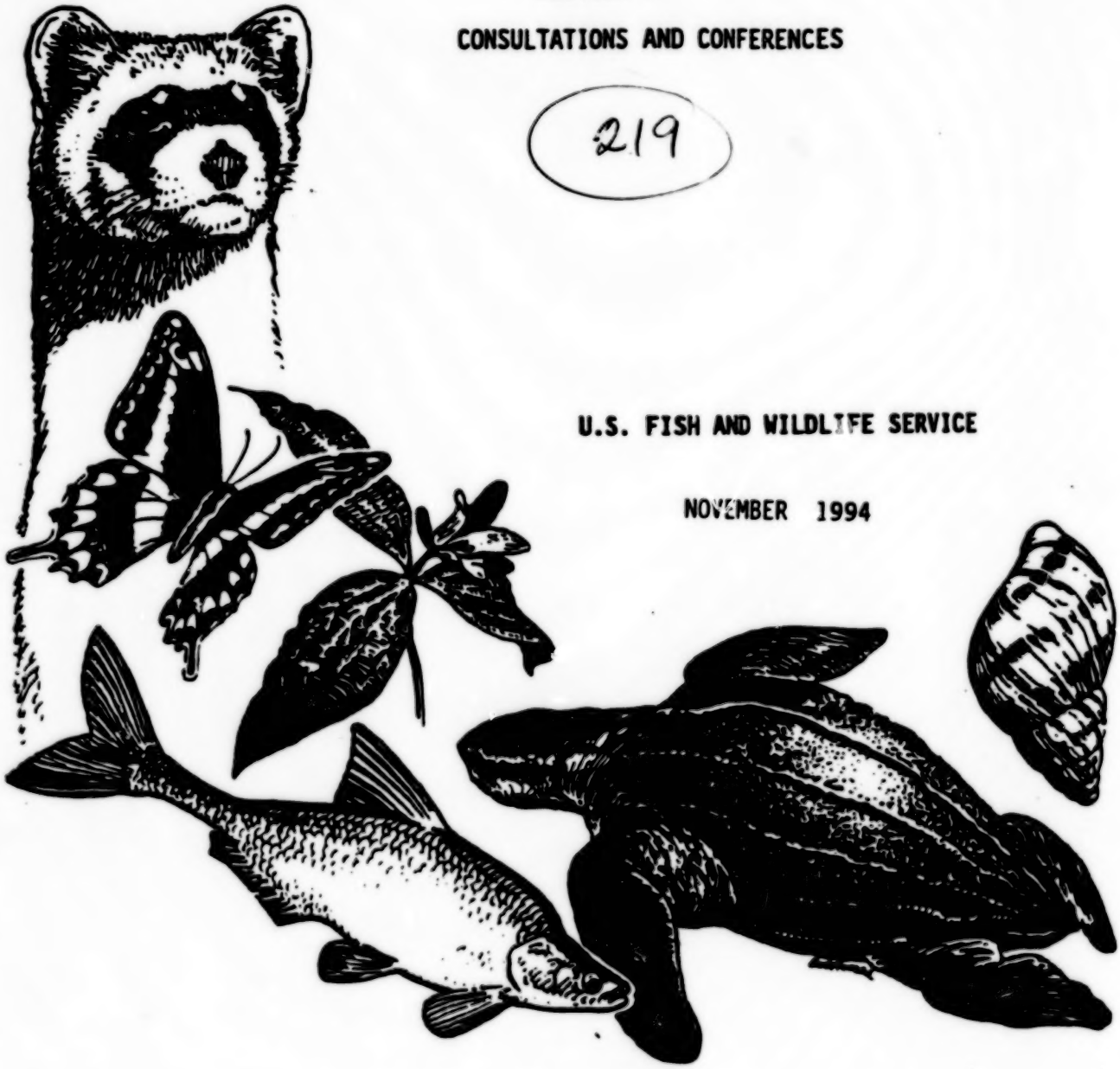

U.S. FISH AND WILDLIFE SERVICE

NOVEMBER 1994

MESSAGE TO REVIEWERS

The enclosed draft document provides internal guidance to the Fish and Wildlife Service (FWS) and the National Marine Fisheries Service (NMFS) on procedures for conducting section 7 consultations and conferences. However, because the document was prepared initially by the FWS for its own use, not all guidance is currently applicable to NMFS' section 7 program. For example, all NMFS biological opinions are issued by the Assistant Administrator for Fisheries rather than the Regional Directors. The final document will be revised to clarify the specific organizational requirements of each Service.

PREFACE

The following guidance is provided to supplement and clarify the regulations issued in 50 CFR Part 402 for the purpose of consistent implementation of those regulations. This guidance supersedes all prior policy and guidance on section 7, is effective on the date of signature, and is to be used until superseded.

Standardized paragraphs are provided for inclusion in biological opinions and incidental take statements to increase consistency and ensure compliance with the regulations. The use of the standardized wording

- indicates that the same bases for making decisions are being used consistently across all Regions;
- helps meet the need for biological opinions and incidental take statements to be complete and correct from a regulatory standpoint;
- produces stronger source documents in court actions by documenting that the Service is correctly considering the important concepts in implementing the regulations;
- helps ensure that all the basics are covered, thus avoiding situations where Federal agencies claim they do not have certain responsibilities because those responsibilities were not expressed in the biological opinion or incidental take statement; and
- is particularly important when expressing the logic that supports the Service's determinations of effect on species and their habitats.

HANDBOOK REVISIONS

Final guidance and revisions will be issued periodically as regulation changes may dictate, new consultation or assessment techniques evolve, and as additional examples or graphics become available.

Revisions will be prepared by the Division of Endangered Species in Washington. Distribution to Service field offices will be the responsibility of the Regional Offices. Distribution of revisions to headquarter offices of other Federal agencies will be the responsibility of the Division of Endangered Species. Regional Offices should provide revisions to other agencies locally, as appropriate.

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Glossary of Terms used in Section 7 Consultations

Action - all activities or programs of any kind authorized, funded, or carried out, in whole or in part, by Federal agencies in the United States or upon the high seas. Examples include, but are not limited to: (a) actions intended to conserve listed species or their habitat; (b) the promulgation of regulations; (c) the granting of licenses, contracts, leases, easements, rights-of-way, permits, or grants-in-aid; or (d) actions directly or indirectly causing modifications to the land, water, or air. [50 CFR §402.02]

Action area - all areas to be affected directly or indirectly by the Federal action and not merely the immediate area involved in the action. [50 CFR §402.02; Handbook section 4.5(A)]

Affect/effect - To affect (a verb) is to bring about a change ("The proposed action is likely to adversely affect piping plovers nesting on the shoreline"). The effect (usually a noun) is the result ("The proposed highway is likely to have the following effects on the Florida scrub jay").

"Affect" appears throughout section 7 regulations and documents in the phrases "may affect" and "likely to adversely affect." "Effect" appears throughout section 7 regulations and documents in the phrases "adverse effects," "beneficial effects," "effects of the action," and "no effect."

Applicant - any person (an individual, corporation, partnership, trust, association, or any other private entity; or any officer, employee, agent, department, or instrumentality of the Federal Government, of any State, municipality, or political subdivision of a State, or of any foreign government; any State, municipality, or political subdivision of a State; or any other entity subject to the jurisdiction of the United States) who requires formal approval or authorization from a Federal agency as a prerequisite to conducting the action. [50 CFR §402.02; Handbook section 2.2(E)]

Anticipated/allowable/authorized - In incidental take statements, the Service determines the amount or extent of incidental take "anticipated" (expected) due to the proposed action or an action modified by reasonable and prudent alternatives. When writing incidental take statements, use only the phrase "anticipated" rather than "allowable" (what the species can stand) or "authorized", as the Service does not authorize (permit) incidental take under section 7. [Handbook section 4.5(B)]

Biological assessment - information prepared on major construction activities by or under the direction of a Federal agency to determine whether a proposed Federal action is likely to adversely affect listed or proposed species, or designated or proposed critical habitat. The outcome of this biological assessment determines whether formal consultation or a conference is necessary. [50 CFR §402.02, 50 CFR §402.12; Handbook section 3.4]

Biological opinion - document stating the opinion of the Fish and Wildlife Service or the National Marine Fisheries Service on whether or not a Federal action is likely to jeopardize the continued existence of listed species, or result in the destruction or adverse modification of critical habitat. [50 CFR §402.02; Handbook section 4.5(A)]

Candidate species - plant and animal taxa considered for possible addition to the List of Endangered and Threatened Species. [50 CFR §424.02(b)]

> **Candidate category 1** - taxa for which the Service has on file sufficient information on biological vulnerability and threat(s) to support proposals to list them as endangered or threatened species.
>
> **Candidate category 2** - taxa for which information now in the possession of the Service indicates that proposing to list as endangered or threatened is possibly appropriate, but for which persuasive data on biological vulnerability and threat are not currently available to support proposed rules.

Conference - a form of interagency cooperation involving discussions between a Federal agency and the Service pursuant to section 7(a)(4) of ESA regarding the effect of an action on proposed species or proposed critical habitat. Conferences are (1) for Federal actions likely to jeopardize proposed species, or destroy or adversely modify proposed critical habitat; (2) designed to help Federal agencies identify and resolve potential conflicts between an action and species conservation early in a project's planning; and (3) develop recommendations to minimize or avoid adverse effects to proposed species or critical habitat. [50 CFR §402.02, §402.10; Handbook chapter 5]

Conservation - the terms "conserve," "conserving," and "conservation" mean to use and the use of all methods and procedures which are necessary to bring any endangered species or threatened species to the point at which the measures provided pursuant to [the] Act are no longer necessary. Such methods and procedures include, but are not limited to, all activities associated with scientific resources management such as research, census, law enforcement, habitat acquisition and maintenance, propagation, live trapping, and transportation, and, in the extraordinary case where population pressures within a given ecosystem cannot be otherwise relieved, may include regulated taking. [ESA §3(3)]

Conservation recommendations - Service or NMFS suggestions resulting from formal or informal consultation that (1) identify discretionary measures a Federal agency can take to minimize or avoid the adverse effects of a proposed action on listed species or critical habitat; (2) identify studies, monitoring, or research to develop new information on listed species or critical habitat; and (3) include suggestions on how an action agency can assist species conservation, associated with the project, in furtherance of their authorities under section 7(a)(1) of ESA. [50 CFR §402.02; Handbook section 4.5(D)]

Constituent elements - physical and biological features of critical habitat including, but not limited to: (1) space for individual and population growth, and for normal behavior; (2) food, water, air, light, minerals, or other nutritional or physiological requirements; (3) cover or shelter; (4) sites for breeding, reproduction, rearing of offspring, germination, or seed dispersal; and generally, (5) habitats that are protected from disturbance or are representative of the historic geographic and ecological distributions of a species. [50 CFR 424.12(b)]

Critical habitat - (1) the specific areas within the geographical area occupied by the species, at the time it is listed in accordance with the provisions of section 4 of ESA, on which are found those physical or biological features (a) essential to the conservation of the species and (b) which may require special management considerations or protection; and (2) specific areas outside the geographical area occupied by the species at the time it is listed in accordance with the provisions of section 4 of ESA, upon a determination by the Secretary that such areas are essential for the conservation of the species. Critical habitats are described in 50 CFR Parts 17 or 226.

Cumulative effects - An analysis of those effects of future State, local, or private activities, not involving Federal activities, that are reasonably certain to occur within the action area of the Federal action subject to consultation. [50 CFR §402.02; Handbook section 4.5(A)]

Designated non-Federal representative - The person, agency, or organization designated by the Federal agency as its representative to conduct informal consultation or prepare any biological assessment. The non-Federal representative must be designated by giving written notice to the Director. If a permit or license applicant is involved and is not the designated non-Federal representative, then the applicant and the Federal agency must agree on the choice of the designated non-Federal representative. [50 CFR 402.02, 50 CFR §402.08]

Destruction or adverse modification of critical habitat - a direct or indirect alteration that appreciably diminishes the value of critical habitat for both the survival and recovery of a listed species. Such alterations include, but are not limited to, alterations adversely modifying any of those physical and biological features [which may have been determined as constituent elements] that were the basis for determining the habitat to be critical. [50 CFR §402.02]

Early consultation - a preliminary formal consultation triggered by a perspective permit or license applicant before any formal application for such permit or license is actually filed with the Federal regulating agency. [Handbook chapter 6]

Effects of the action - direct and indirect effects of an action on the species or critical habitat, together with the effects of other activities that are interrelated or interdependent with that action. The effects of the action are considered along with the environmental baseline and the

predicted cumulative effects to determine the overall effects to the species for purposes of preparing a biological opinion on the proposed action. [50 CFR §402.02; Handbook section 4.5(A)]

Endangered species - any species which is in danger of extinction throughout all or a significant portion of its range. [ESA §3(6)]

Environmental baseline - past and present effects of all Federal, State, or private actions and other human activity in an action area, the expected effects of all proposed Federal projects in an action area that have already undergone formal or early section 7 consultation, and the effect of State or private actions that are contemporaneous with the consultation currently being conducted. [50 CFR §402.02; Handbook section 4.5(A)]

ESA - the Endangered Species Act of 1973, as amended, 16 U.S.C. 1531 et seq.

Federal agency - any department, agency, or instrumentality of the United States. [ESA §3(7)]

Formal consultation - a process that (1) determines whether a proposed Federal action is likely to jeopardize the continued existence of listed species or destroy or adversely modify designated critical habitat; (2) begins with a Federal agency's written request and submittal of a complete initiation package; and (3) concludes with the issuance of a biological opinion and incidental take statement. If a proposed Federal action has any adverse effects on listed species or designated critical habitat, formal consultation is required; the latter includes proposed Federal actions intended to benefit listed species, but adversely affecting listed species or critical habitat in the process or leaving residual adverse effects. [50 CFR §402.02, 50 CFR §402.14; Handbook chapter 4]

Habitat Conservation Plan - a comprehensive planning document that is a mandatory component of an incidental take permit pursuant to section 10(a)(2) of ESA.

Incidental take - take of listed animal species that results from, but is not the purpose of, carrying out an otherwise lawful activity conducted by a Federal agency or applicant. [50 CFR §402.02; Handbook section 4.5(B)]

Indirect effects - environmental effects that are caused by or will result from the proposed action and are later in time, but are still reasonably certain to occur. [50 CFR §402.02]

Informal consultation - an optional process that includes all discussions and correspondence between the Service or NMFS and a Federal agency or designated non-Federal representative to determine whether a proposed Federal action is likely to adversely affect listed species or critical habitat. If a proposed Federal action is likely to result in adverse effects to listed species or designated critical habitat, formal consultation is required. This formal consultation requirement includes

activities that will have an overall beneficial effect on a listed species, but would result in some adverse effects. [50 CFR §402.02, 50 CFR §402.13]

Interdependent actions - actions with no independent utility apart from the action being considered in a biological opinion. [50 CFR §402.02; Handbook section 4.4(A)]

Interrelated actions - actions that are part of a larger action and depend on the larger action for their justification. [50 CFR §402.02; Handbook section 4.4(A)]

Is likely to adversely affect - the appropriate conclusion if any adverse effect to listed species or critical habitat may occur as a direct or indirect result of the proposed action or its interrelated or interdependent actions. In the event the overall effect of the proposed action is beneficial to the listed species or critical habitat, but is also likely to cause some adverse effects, then the proposed action "is likely to adversely affect" the listed species or critical habitat. An "is likely to adversely affect" determination requires formal section 7 consultation.

Is likely to jeopardize/adversely modify proposed species/critical habitat - the appropriate conclusion when the action agency or the Service identify situations in which the proposed action is likely to jeopardize the species or adversely modify the critical habitat. If this conclusion is reached, conference is required.

Is not likely to adversely affect - the appropriate conclusion when effects on the species or critical habitat are expected to be beneficial, discountable, or insignificant. Beneficial effects have contemporaneous positive effects without any adverse effects to the species or habitat. [See Handbook page 2-3 for discussion of benefit for section 10(a)(1)(A) permits.] Insignificant effects relate to the size of the impact and should never reach the scale where take occurs. Discountable effects are those extremely unlikely to occur. Based on best judgment, a person would not: (1) be able to meaningfully measure, detect, or evaluate insignificant effects; or (2) expect discountable effects to occur.

Jeopardize the continued existence of - to engage in an action that reasonably would be expected, directly or indirectly, to reduce appreciably the likelihood of both the survival and recovery of a listed species in the wild by reducing the reproduction, numbers, or distribution of that species. [50 CFR §402.02]

Letter - includes memoranda when referring to Department of the Interior correspondence.

Listed species - any species of fish, wildlife or plant which has been determined to be endangered or threatened under section 4 of ESA. [50 CFR §402.02]

Major construction activity - a construction project (or other undertaking having similar physical effects) which is a major Federal action significantly affecting the quality of the human environment as referred to in the National Environmental Policy Act (NEPA, 42 U.S.C. 4332(2)(C)). The term encompasses dams, buildings, pipelines, roads, water resource developments, and other such undertakings that significantly modify the physical environment. It does not include these or other physical impacts, such as dredging, blasting, etc., unless these activities are major Federal actions for purposes of NEPA. [50 CFR §402.02]

NMFS - the National Marine Fisheries Service.

Plant - any member of the plant kingdom, including seeds, roots, and other parts thereof. [ESA §3(14)]

Preliminary biological opinion - the opinion issued as a result of early consultation. [50 CFR §402.02]

Programmatic consultation - consultation addressing an agency's multiple actions on a program, regional or other basis. [Handbook section 4.7]

Proposed critical habitat - habitat proposed in the Federal Register to be designated or revised as critical habitat under section 4 of ESA for any listed or proposed species. [50 CFR §402.02]

Proposed species - any species of fish, wildlife or plant that is proposed in the Federal Register to be listed under section 4 of ESA. [50 CFR §402.02]

Reasonable and prudent alternatives - alternative actions identified during formal consultation that can be implemented in a manner consistent with the intended purpose of the action, that can be implemented consistent with the agency's legal authority and jurisdiction, that are economically and technologically feasible, and that the Director believes would avoid the likelihood of jeopardizing the continued existence of the listed species or resulting in the destruction or adverse modification of critical habitat. [50 CFR §402.02; Handbook section 4.5(A)]

Reasonable and prudent measures - actions the Director believes necessary or appropriate to minimize the effects, i.e., amount or extent, of incidental take. [50 CFR §402.02; Handbook section 4.5(B)]

Recovery - General: improvement in the status of listed species to the point at which listing is no longer appropriate under the criteria set out in section 4(a)(1) of ESA. [50 CFR §402.02] For jeopardy/adverse modification determinations: improvement in the status of a species and the ecosystems upon which they depend. Said another way, recovery is the process by which species' ecosytems are restored so they can support self-sustaining and self-regulating populations of listed species as persistent members of native biotic communities. [Handbook section 4.5(A)]

"Recovery unit" and "population" - "population," or "distinct population segment," are terms of art used for listing purposes to describe a discrete vertebrate stock that may be added or deleted from the list of endangered and threatened species. A "recovery unit" describes management subsets of the listed species for the purposes of establishing recovery goals or carrying out management actions. To lessen confusion in the context of section 7 and other Endangered Species Act activities, the term "population" will be confined to those species segments officially listed, or eligible for listing, under section 4(a) of ESA. A subset of an animal or plant species that needs to be identified for recovery management purposes will be called a "recovery unit".

Section 4 - the section of the Endangered Species Act of 1973, as amended, outlining procedures for (1) identifying and listing threatened and endangered species; (2) identifying, designating, and revising critical habitat; (3) developing and revising recovery plans; and (4) monitoring species removed from the list of threatened or endangered species.

Section 7 - the section of the Endangered Species Act of 1973, as amended, outlining procedures for interagency cooperation to conserve Federally listed species and designated critical habitat. Section 7(a)(1) requires Federal agencies to use their authorities to further the conservation of listed species. Section 7(a)(2) prohibits Federal agencies from undertaking, funding, permitting, or authorizing actions likely to jeopardize the continued existence of listed species or destroy or adversely modify critical habitat. Other paragraphs of this section establish the requirement to conduct conferences on proposed species; allow applicants to initiate early consultation; require the Service and NMFS to prepare biological opinions and issue incidental take statements. Section 7 also establishes procedures for seeking exemptions from the requirements of section 7(a)(2) from the Endangered Species Committee.

Section 7 consultation - the various section 7 processes, including both consultation and conference if proposed species are involved.

Section 9 - the section of the Endangered Species Act of 1973, as amended, that prohibits the taking of endangered species of fish and wildlife as well as most threatened fish and wildlife species. Additional prohibitions include (1) import or export of endangered species or products made from endangered species; (2) interstate or foreign commerce in listed species or their products; and (3) possession of unlawfully taken endangered species.

Section 10 - the section of the Endangered Species Act of 1973, as amended, providing exceptions to the section 9 prohibitions. The exceptions most relevant to section 7 consultations are takings allowed by two kinds of permits issued by the Service and NMFS: (1) scientific take permits and (2) incidental take permits. The Service can issue permits to take listed species for scientific purposes, or to enhance the propagation or survival of listed species. The Service can also issue permits to take listed species incidental to otherwise legal activity.

Service - the Fish and Wildlife Service.

Species - any subspecies of fish or wildlife or plants, and any distinct population segment of any species of vertebrate fish or wildlife which interbreeds when mature. [ESA §3(15)]

Survival: - For determination of jeopardy/adverse modification: the species' persistence, beyond the conditions leading to its endangerment, with sufficient resilience to allow recovery. Said another way, survival is the condition in which a species continues to exist into the future while retaining the potential for recovery. This condition is characterized by a species with a sufficiently large population, represented by all age classes, genetic heterogeneity, and number of sexually mature individuals producing viable offspring, that exists in an environment providing all requirements for completion of the species' entire life cycle, including reproduction, sustenance, and shelter.

Take - to harass, harm, pursue, hunt, shoot, wound, trap, capture, or collect or attempt to engage in any such conduct. Harm* is further defined to include significant habitat modification or degradation that results in death or injury to listed species by significantly impairing behavioral patterns such as breeding, feeding, or sheltering. Harass is defined as actions that create the likelihood of injury to listed species to such an extent as to significantly disrupt normal behavior patterns which include, but are not limited to, breeding, feeding or sheltering.

Threatened species - any species which is likely to become an endangered species within the foreseeable future throughout all or a significant portion of its range. [ESA §3(20)]

*On March 11, 1994, the District Court for the District of Columbia, in Sweet Home Chapter of Communities for a Great Oregon v. Babbitt, No.92-5255, held invalid the Service regulation defining 'harm' to embrace certain significant habitat modifications. The Department of Interior has petitioned the Supreme Court to review this decision. Until the Supreme Court announces a ruling, application of the definition of "harm" should be coordinated with the Solicitors Office.

CHAPTER 1 - GENERAL INFORMATION

1.1 WELCOME TO SECTION 7 CONSULTATION

Section 7 of the Endangered Species Act (ESA) provides some of the most powerful tools to conserve listed species, assist with species' recovery, and help protect critical habitat. It affords broad authority to Federal agencies to solve existing and potential conservation issues.

A review of the legislative history of ESA and its amendments makes it clear the drafters of the legislation were designing a law with the strength to protect species, while at the same time creating a mechanism encouraging a productive dialogue between project proponents and the agencies charged with implementation of the ESA. It was recognized at an early stage that there would be conflicts arising from the mandate for consultation by Federal agencies and their applicants. It was anticipated that the vast majority of these conflicts would be resolved among project proponents, Federal agencies, the Services.

By law, section 7 consultation is a cooperative effort, one that seeks input from affected parties and involves them in problem resolution. This handbook demonstrates the latitude available within section 7 to work on an informal as well as a formal basis with applicants and agencies during project development.

Although formal section 7 consultation must result in a biological opinion reaching either a jeopardy or no jeopardy (or adverse or no adverse modification of critical habitat) finding, the process still allows room for flexibility. Moreover, in areas where numerous actions exist that all affect a species, baseline effects can be dealt with on a continuing basis, and biological opinions can be used like building blocks to first establish a concern, then warn of potential impacts, and finally result in a jeopardy call. Successive biological opinions can be used to monitor baseline impacts and thereby satisfy the jeopardy avoidance mandate of section 7(a)(2).

Section 7 is a valuable tool in the conservation of listed species. Contained within the mandates of section 7 is a charge to all Federal agencies to utilize their authorities to help recover listed species.

Service biologists have both opportunity and responsibility under section 7 for species conservation. To take optimal advantage of this opportunity, the following thoughts are offered as an expression of the philosophy guiding section 7 work.

- The biology comes first. Know the facts; state the case; and provide supporting documentation.

- Clarity and conciseness are extremely important. They make the various consultation documents more understandable to the non-biologist. For example, a biological opinion should contain enough information to clearly explain the proposed project, its impacts on the affected species, and the Services' recommendations.

- Strong interpersonal skills serve section 7 biologists well. Establishing a positive working relationship with agencies enhances the ability to do the job successfully.

- Present a positive image as a representative of the Services.

- Section 7 is a cooperative process. The Services do not have all the answers. Actively seek the views of the action agency and its designated representatives, and involve them in your opinion preparation, especially in the development of reasonable and prudent alternatives, reasonable and prudent measures, and conservation recommendations.

- Use all aspects of section 7, especially opportunities for informal consultation where solutions can be worked out prior to the more formalized agendas mandated by formal consultation. Be creative, and make the process work to the species' advantage.

- Be flexible but not inconsistent. Study the law, the regulations and this handbook. Know the authorities, be flexible when it is prudent, and stand firm for consistency when warranted.

- Take advantage of professional support within and outside the Services. For example, the Division of Engineering can provide valuable technical review of development proposals. Pursuant to Regional guidance, attorneys in the Regional and field offices of the Solicitor can offer advice on section 7 regulations and the latitudes within which to conduct consultation. Similarly, the Services' law enforcement personnel may be able to answer questions about deliberate or incidental take.

- Strive to solve problems locally.

1.2 ROLES AND RESPONSIBILITIES

(A) Lead Regions for Consultation

When a proposed action takes place in more than one Region, a lead Region is assigned responsibility for the consultation. Generally, the lead Region is the one in which the greatest impact or the largest number of affected species occur. The Regions involved agree on the appropriate lead Region to prepare and sign the biological opinion. If agreement cannot be reached, the matter is referred to Service Directorates.

Coordination between the consultation lead and the recovery lead Regions becomes necessary when a Region consults on a species for which it does not have recovery lead. Coordination enables consistency, although the level of coordination may be mutually agreed to and the lead recovery Region may release other Regions from responsibility for coordinating on no jeopardy or no adverse modification opinions. The Regional Director signing the biological opinion is responsible for its contents, and has final authority to make any jeopardy or other finding. However, any changes the lead Region may make in jeopardy or adverse modification determinations initially made by other Regions must be coordinated before multi-Region opinions are finalized.

Requests for consultation from agencies addressing geographically broad-based or extensive programs are referred to the Washington Office's Division of Endangered Species. This Division coordinates with the Assistant Regional Directors for Ecological Services to decide whether to recommend the formation of a national team, consisting of the involved Regions, to develop the biological opinion. A national team may report to a designated Regional Director or the Assistant Director for Ecological Services. This proposal is submitted to the Director for consideration. The Director's decision will be communicated to the involved Regions.

(B) Signature Authority

Responsibility for implementing section 7 consultation and conference procedures generally rests with the Regional Directors. The Assistant Director for Ecological Services is the responsible official if the biological opinion or conference report (or opinion) is to be signed in the Washington Office. Regional Directors and the Assistant Director for Ecological Services can delegate responsibility and authority to subordinate line officers. However, signatory authority for biological opinions finding jeopardy or adverse modification as well as intra-Service consultations and conference cannot be delegated below the Regional Director/Assistant Director level.

(C) Intra-Service Section 7 Consultation

Intra-Service activities will consider effects on listed, proposed and category 1 candidate species (Fish and Wildlife Service Manual 733 FW 3.2(b)). Category 1 candidates are treated as if they are proposed for

listing. Thus, offices of the Services will consult or confer with the nearest Fish ans Wildlife Service (FWS) Ecological Services field office or National Marine Fisheries Service (NMFS) office (Appendix G) on actions they authorize, fund, or carry out that may affect listed, proposed or category 1 candidate species or designated or proposed critical habitat. These actions include refuge operations, public use programs, private lands and federal aid activities, as well as promulgating regulations and issuing permits. A Service office requesting formal consultation provides the data required by the regulations at 50 CFR §402.14(c) and is treated as any other action agency. See Appendix E for a copy of the Intra-Service Consultation Handbook. All Endangered Species Act section 10 permits potentially affect listed species or critical habitats, requiring formal consultation unless the exception in 50 CFR §402.14(b)(1) applies. Region 9 coordinates with the lead Region on permit applications involving the export or import of listed species.

(D) Information Standards and Sources

Best available scientific and commercial data

The ESA requires the action agency to provide the best scientific and commercial data available concerning the impact of the proposed project on listed species or designated critical habitat. If relevant data are known to be available to the agency or will be available as the result of ongoing or imminent studies, the Services should request those data and any other analyses required by the regulations at 50 CFR §402.14(c), or suggest that consultation be postponed until those data or analyses are available as outlined in section 4.4(A) of this handbook (Exhibit 1-1).

If the action agency, or the applicant, insists consultation be completed without the data or analyses requested, the biological opinion or informal consultation letter should document that certain analyses or data were not provided and why that information would have been helpful in improving the data base for the consultation. In formal consultation, this statement usually appears in the "effects of the action" section. The Services are then expected to provide the benefit of the doubt to the species concerned with respect to such gaps in the information base (H.R. Conf. Rep. No. 697, 96th Cong., 2nd Sess. 12 (1979)). This subsequent analysis may have minor or major consequences (worst case scenario) depending on the significance of the missing data to the effects determination. The action agency also should be advised that if and when further data become available, the need for reinitiation may be triggered.

Section 7 biologists can seek out available information from credible sources such as listing packages for the species, recovery plans, active recovery teams, species experts, State wildlife and plant agencies, Universities, peer-reviewed journals and State Heritage programs. Prior consultations on the species also can provide information on baseline and cumulative effects on the species and its habitat, and should provide the species status and environmental baseline data upon which subsequent consultations are based.

Writing and bibliographic style

- In section 7 consultation documents, keep the first letter of the word "section" lower cased, except when it begins a sentence.

- Write and edit consultation documents according to the Council of Biological Editors (CBE) Style Manual (1983), chapter 4, which outlines prose style for scientific writing.

- Citations included in text should comply with the CBE Style Manual. Bibliographic references should use the following formats:

  1. Single author book.

     Tobin, R. 1990. The expendable future: U.S. politics and the protection of biological diversity. Duke University Press; Durham, North Carolina.

  2. Multiple author book.

     Pickett, S.T.A. and P.S. White. 1985. The ecology of natural disturbance and patch dynamics. Academic Press, Inc.; New York, New York.

  3. Scientific papers (spell out the entire name of the journal).

     Ahlgren, I.F. and C.E. Ahlgren. 1960. Ecological effects of forest fires. Botanical Review 46:304-310.

  4. Unpublished reports (biological assessments, status surveys, section 6 reports, etc.). Cite the document as unpublished. Also include the author's name and the group it was prepared for, as well as their location.

     Helms and Associates. 1992. Results of a diving mussel survey conducted at the Pattison Brothers, Inc. and Ag Products Co. facilities near Clayton, Iowa. Unpublished report prepared for Pattison Brothers, Inc.; Clayton, Iowa.

- Letters and memoranda on non-technical issues should be edited according to the conventions established by the Government Printing Office Style Manual.

(E) Early Alerts

The Regional Directors provide the Washington Office with an early alert to inform the Director of pending biological opinions, preliminary biological opinions (early consultation), and conference opinions of regional or national significance likely to result in findings of jeopardy or adverse modification. The Region submits such alerts as soon as the final terms of the opinion or conference are known, although Regional Directors may also advise the Director of potentially controversial consultations before an early alert is required.

Non-controversial adverse opinions or conferences do not need an early alert unless a series of jeopardy/adverse modification opinions is expected, e.g., numerous pending jeopardy opinions expected for small water depletions in the Colorado River Basin. In this instance, a blanket alert covering the overall issues should be submitted to notify the Washington Office of such developments.

Submit the early alert to the Assistant Director for Ecological Services (Attention: Division of Endangered Species). Allow 10 days in Washington prior to finalizing the opinion to be sure the alert has been reviewed.

Use the following format:

EARLY ALERT

Prepared for: Director State:
Date submitted:

ISSUE: Draft [jeopardy/adverse modification] [opinion/conference] for the [name of the project]

CONSULTING AGENCY/APPLICANT:

PROJECT DESCRIPTION: brief summary

EFFECT ON SPECIES/CRITICAL HABITAT: brief summary of effect on [species/critical habitat]

REASONABLE AND PRUDENT ALTERNATIVES: list

CONGRESSIONAL DISTRICTS AFFECTED:

EXPECTED REACTION OF AGENCY/APPLICANT/OTHER INTERESTED PARTIES:

REGIONAL OFFICE CONTACT:

(F) Release of Draft Documents

Providing action agencies or applicants an opportunity to discuss a developing biological opinion, preliminary opinion, or conference may result in productive discussions that may reduce or eliminate adverse effects. If an action agency asks to review a draft opinion or a draft conference report or opinion, the Services provide a draft. The section 7 regulations do not specify how an action agency should ask for this review. Generally, a telephone request from the equivalent of a field supervisor or higher official, documented in the administrative record, is sufficient.

Applicants can request draft opinion/conference documents through the action agency. When an action agency then requests this document for the applicant, the Services must inform the action agency that, once released to an applicant or the public, the document may no longer be considered an interagency memorandum exempt from the disclosure requirements of the Freedom of Information Act (5 USC §552(b)(5)).

If an action agency or an applicant has comments on a draft opinion or conference document, the action agency must provide those comments to the Services in writing for the record. An applicant may copy the Services with the comments it provides to the action agency. However, the Services have an obligation to consider an applicant's comments or concerns only when they have been officially transmitted by the action agency. [50 CFR §402.14(g)(5)]

(6) Maintaining the Administrative Record

A good administrative record documenting and supporting a consultation and the resulting biological opinion is important, especially if a biological opinion is challenged or questions are raised concerning how or why certain conclusions were reached. At a minimum, administrative records for significant informal consultations, concurrences, conferences, and formal consultations should contain the following as appropriate:

- letters, memoranda, public notices, or other documents requesting the consultation;
- summaries of meetings held, including dates, attendees, purpose, and results or conclusions;
- summaries of field trips or site inspections, including dates, attendees, and photos of the site;
- summaries of personal contacts between the biologist, the Federal agency, applicant, consultant, private citizens or interest groups;
- summaries of telephone conversations pertaining to the consultation, recorded on a standard telephone conversation record form;
- written correspondence pertaining to the consultation, including correspondence from or to a prospective permit or license applicant;
- published material used in developing the consultation except bulky material, which can be referenced; and
- other information used in the consultation process.

Exhibit 1-1 Example of a request for the best scientific data for formal consultation

United States Department of the Interior

FISH AND WILDLIFE SERVICE

[redacted]/Wastewater Management Branch
[redacted]/Water Quality Branch
U.S. Environmental Protection Agency
JFK Building
Boston, Massachusetts 02203

January 14, 1993

Re: Meeting Summary: Lincoln Pulp and Paper/Dioxin/Bald Eagles

Dear Messrs. Papadopoulos and Pirsbum:

The following briefly summarizes discussions between [redacted] and [redacted] of the Environmental Protection Agency (EPA) and [redacted] Environmental Contaminant Specialist and [redacted], Endangered Species Specialist of this office relative to the Lincoln Pulp and Paper Company NPDES permit application (#ME 0002003). A meeting of the above named individuals took place at the USFWS New England Field Office in Concord, New Hampshire, on January 5, 1993.

Background

Current status of the permit application: As a result of the 30-day comment period/public notice, EPA received comments from the Penobscot Indian Nation, USFWS, the State of Maine (?) and the applicant, Lincoln Pulp and Paper (LP&P). The comment period is effectively closed and the process stands between review of comments and final permit issuance.

LP&P is one of seven currently operating kraft process paper mills in Maine. The mill at Old Town is the only other kraft mill on the Penobscot River; other kraft mills are located on the Presumpscot River, St. Croix River, and three on the Kennebec River. The mill at Old Town is larger than LP&P and was reissued a NPDES permit in August 1992. The permit may or may not have been appealed. In the review process, EPA has not accounted for the effects of overlapping discharges (i.e., Old Town mill and LP&P).

Endangered Species

The bald eagle, a Federally endangered species, is a year round resident of the Penobscot River system, and two nesting territories occur within five miles of Lincoln. Both these sites have a very poor production record. One of the sites is apparently within one mile of the area used to stockpile and spread wood waste and treatment plant sludge (outfall 002).

For the past 15 years, the bald eagle population in Maine has exhibited slow but steady recovery from the effects of environmental contamination of its food chain. The population has rebounded from a low of some thirty nesting pairs in the early 1960's to 140 pairs in 1992 (C. Todd, Maine Dept. of Inland Fisheries and Wildlife, in litt., 1992). Nonetheless, reproductive success of Maine bald eagles (young eagles raised per nesting pair) has consistently lagged behind that of other recovering eagle populations (Owen

et al., Trans. of Northeast Fish and Wildlife Conf., 1991). For example, in the Pacific states some 800 nesting pairs of eagles exhibit an average productivity of 1.0 young per pair; in Chesapeake Bay some 250 nesting pairs have an average productivity of 1.1 young/pair; in the Southeastern U.S. some 600 pairs produce an average of 0.9 young per pair (USFWS Federal Register vol. 55, no. 26, 2/17/90). In Maine, productivity has been 10-40 % lower — 0.64 in 1989, 0.78 in 1990, 0.92 in 1991, and 0.80 in 1992; mean = 0.78 (C. Todd, Maine Dept. of Inland Fisheries and Wildlife, in litt.). Concern that Maine eagle productivity is being adversely affected by either a lingering (i.e., residual) pesticide contamination problem or some other contamination problem has prompted several recent investigations.

Bald eagles nesting along the Penobscot River are apparently experiencing even lower reproductive success (0.51, n=12, 4-yr average) than the state population as a whole [0.78, 4-yr average, n>400)]. This represents a 35% lower reproductive rate for the Penobscot River pairs, compared to statewide figures (L. Welch, USFWS, Old Town). Similarly, the eight pairs nesting at or below Lincoln exhibit a history of lower nest success (0.48, 4-yr average) than the three nests along the river above Lincoln (0.66, 4-yr average). Although these differences are not statistically significant (high variance and small sample size), they may be biologically significant and suggest a contaminant or other problem for eagles in the watershed. Please note that the data provided above are different from that distributed at the meeting and the earlier figure should be discarded.

USFWS Region 1 in Oregon and Washington is currently formally consulting with EPA pursuant to Section 7 of the Endangered Species Act (ESA) regarding the setting of a TMDL (Total Maximum Daily Load) for dioxin in the Columbia River. Bald eagles in this watershed are experiencing reduced reproductive success and analyses of eagle egg data confirm elevated levels of dioxin are present. Elevated levels of other contaminants are also present. FWS Region 1 has expressed dissatisfaction with the 0.013 ppq in water (harmonic mean flow). FWS believes it may be inadequate to protect fish and aquatic wildlife, and convened a committee of scientists to evaluate dioxin literature and provide recommendations, which apparently are not yet available. EPA Region 10 (Seattle) funded the cost of collecting and analyzing eagle egg samples from the Columbia River. Copies of several correspondence between FWS Region 1 and EPA Region 10 were provided to EPA staff present.

Section 7 of the ESA clearly places upon the Federal action agency the responsibility to review their programs and evaluate whether a proposed action will adversely affect an endangered species. We note that FWS Region 1 has required that EPA Region 10 play an active role in reviewing the effects of the proposed TMDL on bald eagles and in addition to funding analyses of egg tissues for TDEs (total dioxin equivalents), EPA has consulted experts, conducted literature searches and provided FWS an extensive list of reprints on the subject. We would like EPA Region 1 to assume a more active role in evaluating the effects of this action (and other NPDES permits) on endangered bald eagles and other wildlife.

We currently have a total of 12 (failed) bald eagle eggs collected in 1991 and 1992 in Maine. While none are from Penobscot River nests, one is from Bowdoinham in the Kennebec River watershed (Figure 1). We are currently assessing the concentrations of co-planar aromatic compounds in these 12 eggs. The results of the analyses will indicate the concentration and toxic effects of TDEs in each sample. The toxic effect of egg TDEs will be determined through dose-response bioassays of rat liver cells exposed to co-

planar aromatic compounds extracted from the eggs. We also have 26 blood samples from "presumably healthy" nestling bald eagles collected in Maine during 1991 and 1992. Two of these are from Penobscot River nests (one above Lincoln and one below) and we intend to conduct congener specific analyses on all samples.

We will make every effort to collect addled eggs from Maine in 1993, especially from Penobscot River nests. While we can cover the costs of locating (aerial surveys) and collecting these eggs (contract climber), we request EPA financial assistance in having these samples analyzed (estimated cost at $2,000./sample = $14,000).

Other pertinent biological information: Bald eagles along the Penobscot River are believed to be resident year round (as opposed to migratory), are known to be eating resident fish (as opposed to anadromous fish) and consume whole fish as opposed to muscle fillets. Therefore, we can safely assume a worst case scenario relative to the vulnerability of eagles to a contaminated prey base.

Available fish flesh data from the Penobscot indicate that TDEs in some fish species may presently exceed 25 pptr. (>25 pg/g). EPA Region 1 indicated that an eagle would be adversely affected if it consumed 140 pg TDE/kg of body weight. A 5 kg adult eagle would therefore have to consume only 28 grams of fish containing 25 pg/g in order to be exposed to an adverse dietary dose. We know from other studies, that wintering bald eagles require a minimum of 350g/day of food to meet caloric energy needs. At 25 pg/g of fish, a diet containing >25 pg/g of TDE would expose adult eagles to more than 12 times the recommended daily dose.

Other Biological Resources

The bald eagle is only one of many fish eating birds and mammals present in the watershed. Loons, osprey, mergansers and other diving ducks, as well as great blue herons may be exposed to fish containing elevated levels of dioxin. These species are protected by the Migratory Bird Treaty Act.

We obtained and briefly reviewed a number of scientific articles describing the pathogenic effects of dioxin on birds. In particular, the bird embryo is described as being very vulnerable to dioxin with one researcher calling the egg "the most sensitive toxicological end point". In brief these studies confirmed that biomagnification (water to fish, fish to piscivorous birds) does occur; and that edema, reduced chick weights, depressed growth curves, depressed fledging success or breeding failure (embryotoxicity) has been documented in great blue herons, Forster's terns, and herring gulls - all attributable to elevated dioxin levels.

NPDES Permits

Permits are issued for a five-year period, although EPA has authority to revoke or amend them if new information becomes available. It would be helpful to have a listing of the permits for the other kraft mills in Maine and New England, their locations and expiration/renewal application dates.

We briefly discussed the fact that the river is not currently meeting water quality standards relative to dioxin. Given that, how can an agency contemplate authorizing production increases? Response - no increase in dioxin discharges will be allowed and through the use of BMPs (Best Mgt. Practices) and fish tissue sampling (April and August), dioxin discharges will be minimized and monitored. Since eagles consume whole fish, FWS strongly recommends whole fish or composite sampling.

Recommendations

We urge that the proposed revisions to the existing permit be held in abeyance and that informal consultation be continued. Additional time is required to allow for contaminant analysis of eagle eggs and blood samples in our possession; the collection and analysis of additional eagle eggs from the Penobscot and other watersheds; and for additional literature review. We are also awaiting the outcome of the FWS committee that is reviewing EPA's proposed dioxin TMDL for the Columbia River (due late January 1993). The result of the on-going formal consultation between our agencies on the west coast could have national implications and a bearing on this permit application. This consultation is to be completed by late January 1993 (see enclosed telephone conversation record).

Further coordination regarding this matter should be referred to [redacted] and [redacted] of this office, tel. 603/225-1411.

Sincerely yours,

CHAPTER 2 - COORDINATION

2.1 COORDINATION WITH OTHER ENDANGERED SPECIES ACT FUNCTIONS

(A) Listing

Section 7 compliance may become necessary as soon as a species is proposed for listing or critical habitat is proposed for designation. Conferences generally base analyses of effects on the species status, distribution and threat data included in proposed listing rules, as well as constituent elements described in proposed critical habitat rules. Other reliable data, such as published studies, species accounts, peer-reviewed journal articles also must be considered. Conferences conducted during the proposal period provide listing biologists with information to help refine the analysis of threats, and species or habitat data collected during these conferences. The final listing or critical habitat designation packages provide a primary data source for consultations until recovery plans and recovery-related research become available.

(B) Recovery Planning and Implementation

The 1988 amendments to the ESA require increasingly comprehensive recovery plans that include ***"a description of such site-specific management actions as may be necessary to achieve the plan's goal for the conservation and survival of the species."*** This information should consider the potential effects of activities that may require section 7 consultation, and, at a minimum, should include the following:

- numbers and distribution of recovery units;
- basic life history of the species and its relationships to its supporting habitat;
- natural and human-related factors affecting the species of its habitat, including elements of the species' critical habitat (e.g., requirements for cover; nutriment; presence or absence of fire, flooding, and climatic features; symbionts, including pollinators; effects of predators, competitors, and other limiting factors such as the need for isolation from human or human-related activities or commensals), whose alteration can lead to the species' decreased capability to survive a minimum of 100 years;
- any distinction in species' behavior or essential habitat needs if the species has a different core area or need for another life cycle period (breeding, nonbreeding, migrating or over wintering period); and
- tolerance of the species or essential elements of its habitat to human activities (Exhibit 2-1).

Conservation recommendations should agree with management actions outlined in recovery plans, and recovery plans sometimes identify consultation as a tool encouraging Federal agencies to take their conservation responsibilities seriously. These interrelationships emphasize the importance of coordinating consultation with other recovery efforts. For example, if recovery plans identify specific habitats as essential for species' survival and recovery, close attention should be given to actions that may affect that habitat.

(C) Section 10 Coordination

Endangered and threatened species permits - section 10(a)(1)(A)

Section 10(a)(1)(A) requires a permit from the Services to conduct activities otherwise prohibited by section 9, for scientific purposes or to enhance the propagation or survival of the affected species. In addition, by regulation threatened species permits may be issued for zoological, horticultural, or botanical exhibition and educational or special purposes. Section 10(d) further requires, among other things, the permitted activity not operate to the disadvantage of the species and be consistent with the purposes and policy set forth in section 2 of the ESA. Simply stated, section 10(a)(1)(A) permits are to be issued only when all taking, including anticipated incidental take, associated with the permitted activity will provide a net benefit to the recovery of the species in the wild.

Formal consultation is most likely required on the issuance of Regional blanket permits. Informal section 7 consultation (see Appendix E for the intra-Service consultation) must be conducted prior to issuance of a section 10(a)(1)(A) permit or a subpermit under the Regional blanket permit. Since activities authorized under section 10(a)(1)(A) permits must show an overall benefit to the recovery of the species in the wild, the action is expected to trigger an "is not likely to adversely affect" determination if no takings are involved. As part of the proposed permit action, section 10 biologists are to include appropriate conditions to minimize incidental take while conducting permitted take activities, and to spell out the use or disposition of any dead or injured specimens in a manner which preserves their capability to be used in furtherance of recovery activities. For example, if a researcher is surveying fish and plans to collect 3 for genetic testing and a fish gets harmed during the survey, that injured fish should be collected and counted against the 3 permitted specimens to be collected; or injured and dead specimens may be kept by universities or other appropriate parties for use in other recovery research, thus reducing the need for additional take of the species for these purposes.

A few applications will be for activities that do not clearly show benefit to the species. The section 7 biologist needs to work directly with the Regional permit staff and species experts during the informal consultation phase. Only the Regional permit staff will work with the applicant to see if the proposed activities can be modified or conditioned in a way that reduces impacts and ensures benefit to the species. It is important not to confuse the applicant and to keep a clean administrative record. If additional information is needed from the applicant or if the applicant needs to consider changing the proposal to answer a concern raised in the consultation process, the Regional permit staff should contact the applicant. This can be done by telephone, but needs to be followed with a written confirmation. Applicants should be asked to amend their application request in writing if the proposal is going to change.

If the result of the informal section 7 consultation is that the proposed activity "is likely to adversely affect," formal consultation is required. If after working with the applicant the proposed activity will still not provide a net benefit to the species, the permit applications should be denied.

Consultations for actions covered by the Regional blanket permit may be conducted on an individual subpermit, all anticipated activity for a given species over the permit period, or programmatically on a group of related species with similar recovery or research needs (e.g., freshwater mussels), a group of species within a given ecosystem, or on implementation of recovery plan tasks. All other section 10(a)(1)(A) permits probably will have to undergo individual consultation.

Section 10(a)(1)(A) permits also are required:

- when a reasonable and prudent alternative calls for scientific research that will result in take of the species;
- when the agency, applicant or contractor wishes to carry out additional research not required by an incidental take statement; and
- for species surveys associated with biological assessments (usually developed during informal consultation) that result in take, including harassment.

Habitat conservation planning - section 10(a)(1)(B)

Non-Federal parties planning activities that have no Federal nexus, but that will result in the incidental taking of listed animals, may apply for an incidental take permit under section 10(a)(1)(B). The application must include a habitat conservation plan (HCP) laying out the proposed actions, determining the effects of those actions on affected fish and wildlife species and their habitats (often including proposed or candidate species), and defining measures to minimize and mitigate adverse effects. While HCP's are not required to cover listed and proposed plants, these species must be considered during the section 7 consultation on the permit. Applicants are encouraged to consider listed, proposed and candidate plants for this reason.

The geographic area addressed in HCP's can be quite extensive and can encompass sites addressed in other individual section 7 consultations. Until the section 7 consultation on the section 10 application is completed, the actions addressed in the HCP provide a good source of data for the "cumulative effects" analysis of section 7 consultations.

In some HCP planning areas, parties may strive to find a Federal nexus to avoid the lengthy HCP process. These parties should be advised of the differences between incidental take capabilities under sections 7 and 10. Section 10 expressly authorizes mitigation of adverse impacts (supplying

some benefit to the species such as land acquisition or enhancement to offset unavoidable effects of the action) that does not, in itself, reduce take of the affected individuals. For incidental take considerations under section 7, minimization of impacts on the individuals affected is required. Thus, a proposal to secure and enhance alternative habitat may be appropriate under section 10, but not under section 7 unless it (1) meets the minor change rule and (2) most of the affected individuals can be transplanted and expected to survive at the alternate location. Transplantation has not been demonstrated to be effective in most cases. This situation may be appropriate for red-cockaded woodpeckers that will accept man-made nest cavities. However, transplantation will not work for most birds with strong site fidelity, like the golden-cheeked warbler, where take of the nesting tree effectively kills the pair that used that site, or destruction of adjacent habitat can effectively take the species by introduction of predators and cowbird parasitism.

Whenever practical, consideration should be given to programmatic or ecoregion consultation with Federal agencies having major programs in the HCP areas to facilitate overall consultation and recovery actions for the species involved (see Handbook section 4.7(B)).

Experimental populations - section 10(j)

Generally, within probable historic habitat, section 10(j) of the ESA authorizes listed species to be released as experimental populations outside their currently occupied range to further species conservation. Before making that release, the Services determine by rulemaking whether that population is "essential" or "nonessential". An "essential experimental population" is a reintroduced population whose loss would be likely to appreciably reduce the likelihood of the survival of the species in the wild. A "nonessential experimental population" is a reintroduced population whose loss would not be likely to appreciably reduce the likelihood of survival of the species in the wild. For section 7 consultation purposes:

- any nonessential experimental population located outside a National Park or National Wildlife Refuge System unit is treated as a proposed species (conference may be in order);
- any nonessential experimental population located within a National Park System or National Wildlife Refuge System unit is treated as a threatened species (standard consultations are conducted);
- any essential population is treated as a threatened species (standard consultations are conducted, but special rules may allow take)
- critical habitat may be designated for essential experimental populations, but not for nonessential populations (check applicability of adverse modification analysis); and

- o experimental and nonexperimental populations of the species are considered to be a single listed entity when making jeopardy determinations or other analyses in a section 7 consultation.

A listed species that is reintroduced into its historic range without experimental population status receives full ESA protection.

2.2 COORDINATION WITH THE ACTION AGENCY AND APPLICANT

(A) Formal Consultations and Conferences

The ESA requires action agencies to consult with the Services when there is discretionary Federal involvement or control over the action, whether obvious (issuance of a new Federal permit), or less direct (State operation of a program that retains Federal oversight, such as the National Pollution Discharge Elimination System Program).

Formal consultation becomes necessary when: (1) the action agency requests consultation after determining the proposed action may affect listed species or critical habitat; or (2) the Services, through informal consultation, do not concur with the action agency's finding that the proposed action is not likely to adversely affect the listed species or critical habitat.

An action agency shall confer with the Services if the action is likely to jeopardize the continued existence of a proposed species, or destroys or adversely modifies proposed critical habitat. The conference process helps determine the likely effect of the proposed action and any alternatives to avoid jeopardy or destruction or adverse modification of proposed critical habitat.

When two or more Federal agencies are involved in an activity affecting listed species or critical habitat, one agency is designated as the lead (50 CFR §402.07), often based on which agency has the principal responsibility for the project (e.g., a dam is maintained to provide a power pool for generating electricity - a Federal Energy Regulatory Commission (FERC) responsibility, but the capacity behind the dam also provides flood storage - a Corps responsibility. In this case FERC has lead for the consultation as the dam would probably not be there except for the power generation need). Although one agency has lead, the other still has to provide data for effects analyses and development of reasonable and prudent alternatives and measures if its activities may affect listed species or critical habitat.

(B) Commitment of Resources during Consultation

> *"(d) After initiation of consultation required under subsection (a)(2), the Federal agency and the permit or license applicant shall not make any irreversible or irretrievable commitment of resources with respect to the agency action which has the effect of foreclosing the formulation or implementation of any reasonable and prudent alternative measures which would not violate subsection (a)(2)."*
>
> Section 7(d) of the Endangered Species Act

Section 7(d), was added to the ESA in 1978 as part of the package that created the exemption process. Congress intended this provision to avoid future Tellico Dam scenarios by forbidding certain irreversible and

irretrievable resource commitments during consultation, thus keeping open all opportunities to develop reasonable and prudent alternatives.

Not all irreversible and irretrievable commitments of resources are prohibited. The formulation or implementation of any reasonable and prudent alternative must be foreclosed by the resource commitment to violate section 7(d). Thus, resource commitments may occur as long as the action agency retains sufficient discretion and flexibility to modify its action to allow formulation and implementation of an appropriate reasonable and prudent alternative. Destroying potential alternative habitat within the project area, for example, could violate section 7(d).

This section 7(d) restriction remains in effect from the determination of "may affect" until the action agency advises the Services which reasonable and prudent alternative will be implemented if the biological opinion finds jeopardy or adverse modification (Figure 2-1). Failure to observe this provision can disqualify the agency or applicant from seeking an exemption under section 7.

The action agency may choose not to implement the Services' reasonable and prudent alternative, developing instead one based on what they perceive as the best available scientific and commercial data. The adequacy of the agency's reasonable and prudent alternative is determined and documented by the agency, and, if questioned, is judged under the Administrative Procedure Act's "arbitrary and capricious" standard of review.

The Services do not provide an opinion on the question of resource commitments. Under the exemption process, that question is ultimately referred to the Endangered Species Committee for resolution. However, the Services should notify Federal agencies of the section 7(d) prohibition when formal consultation is necessary. Similarly, under section 7(c), biological assessments must be completed for "major construction activities" before any contracts are entered into or construction is begun.

Figure 2-1 Application of section 7(d): irreversible or irretrievable commitment of resources

I	"May affect" situation exists; formal consultation is required	section 7(d) prohibition begins
II	If:	
	A. The Services concur with a "not likely section 7(d) to adversely affect" finding	not applicable
	B. The Services issue a no jeopardy/adverse modification biological opinion, or the action agency chooses a reasonable and prudent alternative from the jeopardy/adverse modification opinion	section 7(d) obligation expires
	C. Action agency chooses to disagree with the Services' jeopardy/adverse modification determination, or chooses to implement an alternative that has not been prescribed by the Services; and	
	1. The best available scientific and commercial data supports the agency decision	section 7(d) not applicable
	2. The action agency decision is not justified by available data	section 7(d) applies
III	Reinitiation of consultation is required under 50 CFR §402.16 (Return to step II)	section 7(d) applies

(C) Dealing with Nonresponsive Agencies

Agencies that refuse to consult or confer

When an action agency disagrees or does not respond to the Services' informal suggestions for consultation or conference, the Services send a letter requesting the agency to initiate such action. The letter notifies the agency of its responsibilities under the ESA, and presents a clear case for the Services' determination of "may affect" for listed species or "likely to jeopardize" for proposed species. Possible adverse modification of designated or proposed critical habitat is treated similarly. If the agency still refuses to consult, the issue should be elevated to the Regional Office. The Regional Director can pursue the need to consult with the action agency.

The Services cannot force an action agency to consult. However, if the proposed action is likely to result in take of a listed fish or wildlife species, the matter should be referred to the Services' Law Enforcement Division and the Office of the Solicitor. Additionally, if the action agency requests consultation after-the-fact, that consultation cannot eliminate any section 9 liability for incidental take that has already occurred (Appendix D, Solicitor's opinion #SO-5).

Finally, the Services do not provide an opinion or conference report if the agency has not identified a "may affect" situation already, as such an opinion or report may be challenged as incomplete where no consultation (discussion) with the agency took place. This guidance does not apply where the Services and the action agency have an agreement on when consultations will be conducted.

Agencies that refuse to reinitiate consultation

When consultation needs to be reinitiated but the action agency neither agrees nor responds, the Services send a letter clearly outlining the change of circumstances that supports the need for reinitiation. The procedures outlined above apply here also.

(D) Compliance with Section 7(a)(2)

The action agency determines whether and how to proceed with its proposed action in light of the Services' biological opinion, even though the terms and conditions of incidental take statements are non-discretionary. Nevertheless, the Services' biological opinion is entitled to great deference by any reviewing court, and action agencies must give great weight to the Services' biological opinion before deciding on a proposed action. Failure to explain in the administrative record how the agency addressed the Services' biological opinion could expose the action agency to a judicial challenge under both the ESA and the Administrative Procedure Act.

No jeopardy and/or no adverse modification finding

The action agency may proceed with the action as proposed, provided no incidental take is anticipated. If incidental take is anticipated, the agency or the applicant must comply with the reasonable and prudent measures and implementing terms and conditions in the Services' incidental take statement to avoid liability from taking under the ESA.

Jeopardy/adverse modification finding

If a jeopardy or adverse modification determination results from the consultation, the action agency may;

- o adopt one of the reasonable and prudent alternatives for eliminating the jeopardy or adverse modification of critical habitat in the opinion;
- o decide not to grant the permit, fund the project, or undertake the action;
- o request an exemption from the Endangered Species Committee (Appendix H);
- o reinitiate the consultation by proposing modification of the action or offering reasonable and prudent alternatives not yet considered; or
- o choose to take other action if it believes, after a review of the biological opinion and the best available scientific information, such action satisfies §7(a)(2).

The action agency must notify the Services of its final decision on any proposed action that receives a jeopardy or adverse modification biological opinion (50 CFR §402.15(b)).

Incidental take statements

Violation of the section 9 taking prohibition results in liability unless the terms and conditions of the incidental take statement are followed. The agency must undertake the required actions to minimize incidental take, or require these actions as conditions of the permit or grant. The agency must retain sufficient control over the implementation of these actions for the exemption from the section 9 taking provisions to remain in effect; otherwise, the incidental take statement may lapse, requiring the applicant to seek an incidental take permit under section 10 for protection from possible section 9 liability.

(E) Role of the Permit or License Applicant

Identification of an applicant

The Services do not formally determine whether there is or who is an applicant for a Federal agency action, although the regulations and their preamble provide guidance. The Federal action, in this instance, is approval of a permit or license sought by the applicant, together with the activities resulting from such permission. The action agency determines applicant status, including requests arising from prospective applicants in early consultations. The action agency also determines how the applicants are to be involved in the consultation, consistent with provisions of section 7(a)(3), (b) and (c) of the ESA and the section 7 regulations.

Users of public resources (e.g. timber companies harvesting on National Forests) are not parties to programmatic section 7 consultations dealing with an agency's overall management operations or permitting program. They may become applicants if they are a party to a discrete action (i.e., where they are already the successful bidder on a timber sale that becomes the subject of later consultation or reinitiation when a new species is listed or new critical habitat is designated).

If an agency supports an "applicant" who does not meet the criteria described above, the Services nonetheless should try to work with that party, although the procedural opportunities afforded to applicants will not apply to that party.

Applicant's role in the consultation process

If the Federal agency identifies an applicant, the Services meet their obligations to that party as outlined in 50 CFR Part 402, which provide opportunities for applicant involvement:

- the action agency is to provide an applicant an opportunity to submit information for consideration during the consultation;
- the applicant must be informed of the estimated length of any extension of the 180-day timeframe for preparing a biological assessment, along with a written statement of the reasons for the extension;
- the timeframes for concluding formal consultation cannot be extended beyond 60 days without the applicant's concurrence;
- the applicant is entitled to review draft biological opinions obtained through the action agency, and to provide comments through the action agency;
- the Services will discuss the basis of their biological determination with the applicant and seek the applicant's expertise in identifying reasonable and prudent alternatives to the action if

likely jeopardy or adverse modification of critical habitat is determined; and

- the Services provide the applicant with a copy of the final biological opinion.

The Services do not work directly with or take comments directly from the applicant without the knowledge or consent of the action agency.

(F) Role of the Non-Federal Representative

Non-Federal representatives may be involved in the informal consultation process and may request and receive species lists, prepare the biological assessment, and provide information for the formal consultation. However, the Services require the action agency to formally designate the non-Federal representative in writing. Moreover, the action agency must be made aware that the ultimate responsibility for section 7 obligations remains with the action agency.

2.3 FWS COORDINATION WITH THE NMFS

The NMFS is responsible for consultation on species under its jurisdiction. Currently listed species that may require coordination with NMFS include several whales, the Hawaiian monk seal, several runs of salmon in the Northwest and California, the short-nosed sturgeon, and sea turtles while in the water. Increasingly, consultations on Service-administered species overlap with those administered by NMFS. In these instances the Service should strive to coordinate informal and formal consultations with their NMFS counterparts. When formal consultations also may affect species under NMFS jurisdiction, the Service needs to remind the action agency, through early correspondence and/or as a footnote to the formal consultation package, of the need to consult with NMFS.

Coordination with NMFS is critical to ensure any reasonable and prudent alternatives prescribed by the Services (e.g., the Central Valley Project in California) are compatible. The terms and conditions of incidental take statements must be compatible so the action agency can implement both opinions without needing further consultation.

2.4 COORDINATION WITH OTHER FEDERAL AGENCIES

Consultations with other Federal agencies follow 50 CFR Part 402, unless counterpart regulations (explained in 50 CFR §402.04) are approved for that agency. Although no counterpart regulations have been issued to date, field stations may consider entering into optional procedures that provide better working relationships with other agencies at a local level consistent with 50 CFR Part 402. For example, in the Southeast the Forest Service wants a written record or determination of effects of their actions on listed species so they have an understanding with local field offices that concurrences will be provided even for beneficial activities. Other agencies may wish to consult on all or a subset of their activities on a local or regional programmatic basis.

Questions also arise about the relationship of section 7 to specific agency programs:

Bureau of Indian Affairs (BIA): All actions funded, permitted, or undertaken by BIA for the benefit of Indian tribes or other Native American entities will involve BIA when Federal agency decisions or other actions are required. The tribe/entity may serve as the designated non-Federal representative or applicant, but does not have standing as a Federal agency for consultation purposes.

Office of Hearings and Appeals (OHA): A January 8, 1993, memorandum (Appendix D) from the Secretary clarified that OHA has no authority to review the merits of the Services' biological opinions. That review is limited to the Federal courts.

Corps of Engineers (Corps), Bureau of Reclamation (Reclamation), Federal Energy Regulatory Commission (FERC): Ongoing operations, relicensing and reauthorizations for water projects that predate the ESA are subject to consultation if the agency retains any discretion in continuing project operations.

Environmental Protection Agency (EPA): Programs delegated to States for operation are subject to consultation at the time of delegation, and to continuing review when EPA provides program oversight or funding.

Resolution Trust Corporation (RTC) and Federal Deposit Insurance Corporation (FDIC): The Department of Justice has not determined whether these are Federal agencies required to observe the Endangered Species Act and other environmental laws. The Services have been advised not to enter into formal consultation with RTC or FDIC until this issue has been settled. Upon request, technical assistance may be provided on the occurrence of listed, proposed or candidate species in their project areas.

Federal Emergency Management Agency (FEMA): All of FEMA's actions are subject to the ESA, although the nature of some of their programs may call for greater use of the emergency consultation process. Improving the

Services' working relationships with FEMA counterparts can help develop appropriate responses to categories of emergencies before a crisis occurs.

Housing and Urban Development (HUD): Most parties seeking HUD grants have completed project planning before applying for the grant. Knowing early on about developments being considered in a species' range can help with project direction. If HUD monies are likely to be sought, the applicant can be encouraged to use the early consultation process. If there is no Federal nexus, a section 10(a)(1)(B) permit may be appropriate.

2.5 COORDINATION WITH STATE AGENCIES

The Services' policy dated July 1, 1994, regarding the role of State agencies in ESA activities calls for cooperation with States as follows:

The term State agency means any State agency, department, board, commission, or other governmental entity that is responsible for the management and conservation of fish, plant, or wildlife resources within a State.

As part of the consultation program, it is the policy of the Services to:

- inform State agencies of any agency action that may affect listed or proposed species or designated or proposed critical habitat (e.g., formal consultation), and request their information, including the results of any related studies, in analyzing the effects of the action and cumulative effects on the species and habitat.

- request an information update from State agencies prior to preparing the final biological opinion to ensure that the findings and recommendations are based on the best scientific and commercial data available.

- recommend to Federal agencies that they provide State agencies with copies of the final biological opinion unless the information related to the consultation is protected by national security classification or is confidential business information (see Handbook sections 4.7 and 4.8). Decisions to release such classified or confidential business information shall follow the action agency's procedures. Biological opinions, not containing such classified or confidential business information, will be provided to the State agencies by the Services, if not provided by the action agency, after 10 working days. The exception to this waiting period allows simultaneous provision of copies when there is a joint Federal-State consultation action.

application request in writing if the proposal is going to change.

Exhibit 2-1 Discussion of species' tolerance to disturbance (from the draft management plan for the Pawnee montane skipper)

Populations in both the South and North Forks are needed to buffer against a single event or combination of events eliminating the butterfly from one of the areas. Only activities with negligible effects should be allowed without limit, and those with moderate effects should be kept at or below some reasonable upper limit. Activities with major effects should be avoided altogether. Activities of varying impact have been identified as follows:

1. Activities with no effect or slight effect:

   (a) activities on the water or on the water's edge would have negligible effect on the skipper's habitat, including, but are not limited to, fishing, boating, piers, and boat docks; and (b) rights-of-way for power lines if less than 730 m, not treated with herbicides, and if maintained for host and nectar plants.

2. Activities with moderate effects:

   (a) campgrounds not located in the densest subpopulation areas (1-4), not located in areas of major Liatris (principle food supply) density (150+ flowering stems/acre), and without large areas covered with parking lots, lawns, ball fields, or scraped areas. Campsites should be widely spaced and heavy foot traffic should be confined to designated paths; (b) narrow (1 lane with pullouts) paved or improved roads that avoid areas of major Liatris concentrations, road verges and adjacent berms and cuts should be managed to encourage growth of skipper nectar plants, and adjacent "brown-out" herbicided strips should be avoided; and (c) low density housing or commercial development that results in an aggregate of 5 percent or less of the suitable habitat of any subpopulations rendered unsuitable by roads, structures, lawns, plantings, parking lots, or associated activities.

3. Activities with major effects:

   (a) any activity or combination of activities that eliminates more than 5 percent of any subpopulation's habitat areas; (b) any habitat-displacing activity located in an area of Liatris with 150 or more flowering stems/acre; and (c) any activity or development that creates large blocks of unsuitable habitat-- large paved parking lots, wide paved roads with broad graveled shoulders and adjacent herbiciding, wide power line rights-of-way treated with herbicides, subdivisions with large lawns, cultivated plots, or heavily grazed habitat.

CHAPTER 3 - INFORMAL CONSULTATION

3.1 THE INFORMAL CONSULTATION PROCESS

Although described as an optional process, most consultations are conducted informally with the Federal agency, or a designated non-Federal representative. Informal consultations:

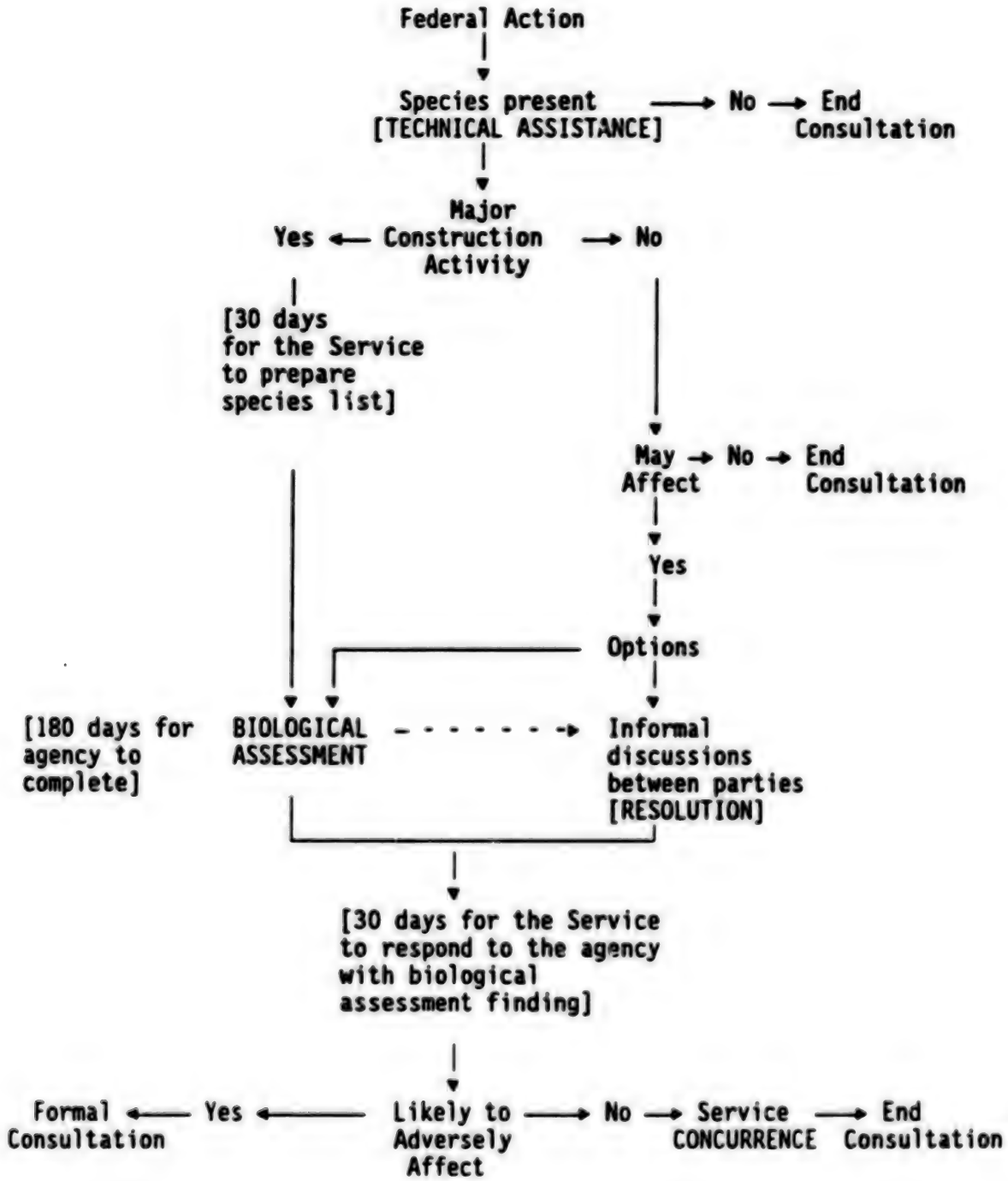
- o clarify whether and what listed, proposed, and candidate species or designated or proposed critical habitats may be in the action area;
- o determine what effect the action may have on these species or critical habitats;
- o explore ways to modify the action to reduce or remove adverse effects to the species or critical habitats;
- o determine the need to enter into formal consultation for listed species or designated critical habitats, or conference for proposed species or proposed critical habitats; and
- o explore the design or modification of an action to benefit the species.

When used in the context of consultation, the term "informal" suggests an unstructured approach to meeting section 7 requirements. Such consultation includes phone contacts, meetings, conversations, letters, project modifications and concurrences that occur prior to (1) initiation of formal consultation because adverse effects cannot be avoided or (2) Service concurrence that formal consultation is not necessary. Participation in informal consultation may include (1) the action agency, (2) the designated non-Federal representative, (3) the applicant or permittee, or (4) consultants working on behalf of any of the first three. Service biologists may use informal consultations to encourage additional work to document the species' status in the action area either to preclude or provide the basis to initiate formal consultation.

While there is no overall timetable for informal discussions, timeframes are established for individual elements of informal consultation (Figure 3-1). Dialogue can continue as long as progress is being made.

See Exhibits 3-1 to 3-6 for examples of informal consultation correspondence. Documentation of the steps in the process is essential to its continued utility and success. The administrative file should contain records of phone contacts, including name of the caller, the purpose of the call as it relates to the proposed action or action area, and any advice or recommendations provided by the Service biologist. Meetings can be easily documented by letter to appropriate parties that summarizes the meeting results, particularly any Service concerns and recommendations.

Figure 3-1 Informal consultation process



3.2 IDENTIFICATION, RESOLUTION, AND CONSERVATION

Many consultations can and should be handled informally. This gives the Services an opportunity to be involved early and to resolve problems as they come to light.

Informal consultation determines the likelihood of adverse effects on a listed species or critical habitat. Informal consultations (1) identify adverse effects and suggest ways to avoid them, (2) resolve project conflicts or differences of opinion between the Services and the action agency or applicant as to the nature and extent of adverse effects, (3) provide the action agency with opportunities to carrying out conservation activities pursuant to section 7(a)(1), and (4) help monitor cumulative effects on a species or ecosystem.

Service biologists must be well informed about species status, distribution, threats, and recovery objectives to carry out the informal consultation process effectively. The logical place to start data gathering is the field station's species files. Other reliable sources are State Fish and Wildlife agencies, Federal land management agencies, State Natural Heritage Programs, species experts, cooperative research units, recovery teams, The Nature Conservancy, and private consultants. All may provide or verify information, and should be used as needed.

Conflict resolutions during informal consultation may involve changes in construction scheduling, engineering design, pesticide formulation or application method, location, emission or discharge levels and many others. All possible options to eliminate adverse effects should be discussed freely with the action agency, and they should be encouraged to recommend their own. The Services do not offer "may affect" determinations unless the project's dimensions are clearly defined at the informal stage.

Finally, informal consultation offers action agencies an opportunity to address their conservation responsibilities under section 7(a)(1). Recovery plans often identify tasks benefiting listed species that may be carried out on or near the project site. Examples include habitat protection, modification or improvement; predator control; and survey work.

3.3 TECHNICAL ASSISTANCE

A telephoned or written inquiry about the presence or absence of listed and/or proposed species in a project area usually initiates informal consultation. Service biologists may respond in many ways. If species are not likely to be present, the consultation requirement is met, and the Services may advise the agency, applicant or consultant of this in writing. If historical records or habitat similarities suggest the species may be in the area, then some survey work may be recommended to make a more precise determination. If the species is definitely in the project area, but the Services determine it will not be adversely affected, the Services may notify the agency of that finding (e.g., bald eagles fly over but do not feed, roost, or nest in the area, and are not expected to be adversely

affected).

Technical assistance from the Services may take a variety of forms. It includes information on candidate species as well as names of contacts having information on State listed species. The Services may provide correspondence to State agencies or other Service offices to alert them to a project (Exhibit 3-2).

The Services may recommend that the action agency conduct additional studies on species' distribution in the area affected by the action. Normally, Service biologists only request additional survey work, but sometimes monitoring impacts of the action on aspects of the species' life cycle may be agreed upon during informal consultation. Monitoring may be recommended when incidental take is not anticipated but might possibly occur, thus triggering the need for project changes or formal consultation. The action agency has no legal obligation to conduct or pay for these studies, but Service biologists should point out the advantages of doing them during informal consultation, particularly if the data gathered may preclude formal consultation.

While candidate species have no legal protection, Service biologists should notify agencies of candidates in the action area and may recommend ways to reduce adverse effects and/or request studies as appropriate. Legally, the action agency does not have to comply. However, candidate species, particularly category 1 species, are likely to be listed soon, possibly making conference imminent. Category 2 candidate species, while less likely to be addressed promptly, should still be brought to the agency's attention. Here also, biologists should try to reduce adverse effects or encourage further studies, generally as conservation recommendations. Addressing candidates at this stage of consultation provides a focus on the overall health of the local ecosystem.

At this time, only technical assistance can be provided to the Resolution Trust Corporation and the Federal Deposit Insurance Commission, as their status as Federal agencies subject to the ESA is still in question. Similarly, only technical assistance can be provided to agencies conducting actions outside the United States (e.g., in northern Mexico), but knowledge of such actions can be considered in the "status of the species" analysis if contiguous populations of the species (e.g., Mexican spotted owl) that extend across the border are important to the survival and recovery of the species.

3.4 BIOLOGICAL ASSESSMENTS

"(c)(1) To facilitate compliance with the requirements of subsection (a)(2) each Federal agency shall . . . request of the Secretary information whether any species which is listed or proposed to be listed may be present in the area of such proposed action. If the Secretary advises, based on the best scientific and commercial data available, that such species may be present, such agency shall conduct a biological assessment for the purpose of identifying any endangered species or threatened species which is likely to be affected by such action. Such assessment shall be completed within 180 days after the date on which initiated (or within such other period as is mutually agreed by the Secretary and such agency, except that if a permit or license applicant is involved, the 180-day period may not be extended unless such agency provides the applicant, before the close of such period, with a written statement setting forth the estimated length of the proposed extension and the reasons therefor) and before any contract for construction is entered into and before construction is begun with respect to such action. Such assessment may be undertaken as part of a Federal agency's compliance with the requirements of section 102 of the National Environmental Policy Act of 1969 (42 U.S.C. 4332).

(2) Any person who may wish to apply for an exemption under subsection (g) of the section for that action may conduct a biological assessment to identify any endangered species or threatened species which is likely to be affected by such action. Any such biological assessment must, however, be conducted in cooperation with the Secretary and under the supervision of the appropriate Federal agency."

Section 7(c) of the Endangered Species Act

By regulation, a biological assessment is prepared for "major construction activities" considered to be Federal actions significantly affecting the quality of the human environment as referred to in the National Environmental Policy Act of 1969 (NEPA) (42 U.S.C. 4321 et seq.). A biological assessment is required if listed species or critical habitat may be present in the action area, and is optional if only proposed species or proposed critical habitat is involved. An assessment also may be recommended for other activities to ensure the agency's early involvement and increase the chances for resolution during informal consultation.

If a biological assessment is required, formal consultation cannot be initiated until the biological assessment is completed. Some agencies submit an assessment early, benefitting from the informal consultation process; some need to be advised to do so. When Service biologists advise an action agency of the need for a biological assessment, the letter should indicate the importance of completing the assessment before letting contracts or beginning construction.

Either the applicant or a non-Federal representative (often a consulting firm) prepares the biological assessment, though the action agency takes

responsibility for the findings of effect. The contents of the assessment are discretionary, but generally include results of on-site inspections determining the presence of listed or proposed species, an analysis of the likely effects of the action on the species or habitat based on biological studies, review of the literature, and the views of species experts. The assessment also describes any known unrelated future non-Federal activities ("cumulative effects") in the action area likely to affect the species. Sometimes information in other environmental analysis documents can substitute or be easily modified to produce the assessment.

The biological assessment should address listed and proposed species if the proposed action is likely to affect them both. Such an assessment may help determine the need for conference as well as formal consultation. A biological assessment may be prepared (50 CFR §402.12(b)(1)) if it appears the agency or the applicant may wish later to seek a permanent exemption from the Endangered Species Committee.

The agency is not required to prepare a biological assessment for non-construction activities but, if a listed species or critical habitat is likely to be affected, the agency must provide the Services with an account of the basis for evaluating the likely effects of the action. The Service uses this documentation along with any other available information to decide if concurrence with the agency's determination is warranted. For projects not involving major construction nor requiring an assessment, the Services may still work informally with the agency to eliminate adverse effects.

Sometimes, biological assessments are confused with environmental assessments. The contents of biological assessments prepared pursuant to the ESA are largely at the discretion of the action agency although the regulations provide recommended contents (50 CFR §402.12). Biological assessments are not required to analyze alternatives to proposed actions. However, environmental assessments prepared pursuant to NEPA determine the necessity of environmental impact statements. An alternatives analysis is often pivotal to that determination.

3.5 CONCURRENCE/NONCONCURRENCE LETTERS

Following review of the biological assessment or other pertinent information, another informal effort may be appropriate to try to eliminate any residual adverse effects. If that effort results in elimination of potential impacts, the Services concur in writing that the action, as revised and newly described is not likely to adversely affect listed species or designated critical habitat. Since concurrence depends upon implementation of the modifications, the concurrence letter must clearly state any modifications agreed to during informal consultation. If agreement cannot be reached, the agency is advised to initiate formal consultation.

When the biological assessment or other information indicates no likelihood of adverse effect, the Services provide a letter of concurrence, which completes informal consultation. This analysis, based on review of all potential effects, direct and indirect, is documented in the concurrence letter. If the nature of the effects cannot be determined, benefit of the doubt is given to the species. Do not concur in this instance. After evaluating the potential for effect one of the following determinations is made:

Listed species/designated critical habitat

- **No effect** - the appropriate conclusion when the action agency determines its proposed action will not affect a listed species or critical habitat.

- **Is not likely to adversely affect** - the appropriate conclusion when effects on the species or critical habitat are expected to be beneficial, discountable, or insignificant. Beneficial effects have contemporaneous positive effects without any adverse effects to the species or habitat. [See page 2-3 for discussion of benefit for section 10(a)(1)(A) permits.] Insignificant effects relate to the size of the impact (and should never reach the scale where take occurs). Discountable effects are those extremely unlikely to occur. Based on best judgment, a person would not: (1) be able to meaningfully measure, detect, or evaluate insignificant effects; or (2) expect discountable effects to occur.

- **Is likely to adversely affect** - the appropriate conclusion if any adverse effect to listed species or critical habitat may occur as a direct or indirect result of the proposed action or its interrelated or interdependent actions. In the event the overall effect of the proposed action is beneficial to the listed species or critical habitat, but also is likely to cause some adverse effects, then the proposed action "is likely to adversely affect" the listed species or critical habitat. An "is likely to adversely affect" determination requires formal section 7 consultation.

Proposed species/proposed critical habitat

A fourth finding is possible for proposed species or proposed critical habitat:

- **Is likely to jeopardize/adversely modify proposed species/critical habitat** - the appropriate conclusion when the action agency or the Services identify situations in which the proposed action is likely to jeopardize the proposed species or adversely modify the proposed critical habitat. If this conclusion is reached, conference is required.

Exhibit 3-1 Example of a species list

United States Department of the Interior

FISH AND WILDLIFE SERVICE
Ecological Services
c/o CCSU, Campus Box 338
6300 Ocean Drive
Corpus Christi, Texas 78412

December 18, 1991

[redacted]
United Gas Pipe Line Company
P.O. Box 4085
Victoria, Texas 77903-4085

Consultation No. 2-11-92-I-056

Dear [redacted]:

This responds to your letter dated November 19, regarding the effects of the proposed replacement of sections of pipe on species Federally listed or proposed for listing as threatened or endangered occurring in Goliad County, Texas. In addition your project was evaluated with respect to wetlands and other important fish and wildlife habitat.

It is our understanding that the proposed project would involve the replacement of five (5) sections of 6" pipe totaling 119 feet. Associated construction activities would be within the existing right-of-way located in the Cabeza Creek Field. This project is intended to maintain efficient operations of United's pipeline system.

Our data indicates that the following species may occur in the area:

Attwater's prairie chicken (Tympanuchus cupido attwateri) - E
bald eagle (Haliaeetus leucocephalus) - E

Candidate Category 2 species are those for which available information indicates that proposing to list as endangered or threatened is possibly appropriate, but substantial data on biological vulnerability or threats are not currently known to support the immediate preparation of listing rules. The following Candidate Category 2 species may occur in the project area:

Gulf Coast hog-nosed skunk (Conepatus leuconotus texensis) - C2
long-billed curlew (Numenius americanus) - C2
Runyon's water-willow (Justicia runyonii) - C2
Texas horned lizard (Phrynosoma cornutum) - C2
Welder spine aster (Machaeranthera heterocarpa) - C2

Our data indicate that Federally listed species are not likely to be impacted by the proposed project action. With respect to wetlands and other important fish and wildlife habitat, it appears that the proposed action will not significantly impact these resources. If project plans change or portions of the proposed project were not evaluated, it is our recommendation that the changes be submitted for our review.

Exhibit 3-2 Example of a need for survey

January 26, 1993

[redacted]
Stone & Webster Environmental Services
245 Summer Street
Boston, Massachusetts 02210

Dear [redacted]:

This responds to your letter dated December 28, 1992 requesting information on the presence of Federally listed and proposed endangered or threatened species in relation to the proposed Portland, Maine to Canada Natural Gas Pipeline for the Portland Natural Gas Transmission System.

Based on information currently available to us, the Federally listed endangered small whorled pogonia (Isotria medeoloides) is known to occur in several of the towns in southern Maine through which the proposed transmission lines may pass. The small whorled pogonia occurs both in fairly young forests and in maturing stands. Although varying in their composition, the mixed-deciduous or mixed-deciduous/coniferous forests in which the small whorled pogonia grows are generally in second or third-growth successional stages. The ages of the older trees forming the canopy at some of the sites has been estimated to be about 75 years old in New Hampshire.

The soil in which the shallowly-rooted small whorled pogonia grows is usually covered with leaf litter. The substrate in which it is rooted may be a variety of different textures, from extremely stony glacial till, to stone-free sandy loams, to sterile duff. The common soil factor at most sites is the highly-acidic, nutrient-poor quality of the soil in which this orchid grows.

The majority of Isotria medeoloides sites generally share several common characteristics. These include only sparse to moderate ground cover in the microhabitat of the orchids (except when among ferns), a relatively open understory canopy, and nearness to logging roads, streams, or other features that create long persisting breaks in the forest canopy. For example, in New Hampshire, the small whorled pogonia has been found growing in and adjacent to recently abandoned, above ground telephone transmission lines.

Inasmuch as distributional information on many rare species is incomplete or imprecise, it is not currently possible to provide a definitive finding relative to small whorled pogonia occurrence in the project area. Therefore, in situations such as this, where an endangered species is known to occur in similar habitats nearby, a qualified botanist should survey the following proposed alignments prior to construction activities: alignment sections with corresponding numbers 11 - 20 (no Figure identified) and No.s 37 - 39 (Fig. 35). A survey for the small whorled pogonia should be conducted by a botanist familiar with this species and should occur in July or August to ensure best survey conditions.

In addition for the potential of small whorled pogonia populations occurring within the project area, the Federal candidate Category 2[1] species, the variable sedge (Carex polymorpha) is known to occur at several locations near Portland. While Federal candidate species are not afforded protection under the Endangered Species Act, the U.S. Fish and Wildlife Service encourages their consideration in environmental planning. If unnecessary impacts to candidate species can be avoided, the likelihood that they will require the protection of the Act in the future is reduced. We recommend that the alignment in the vicinity of Portland and Falmouth be surveyed for the variable sedge.

One portion of the proposed alignment near Willoughby, Vermont (Figure 11) passes within five miles of a nest site of the Federally listed endangered peregrine falcon (Falco peregrinus anatum). However, based on the proposed project's distance from the nest (approximately 5 miles), we do not expect any impacts to occur to the resident peregrine falcons.

No other Federally listed or proposed threatened and endangered species under the jurisdiction of the U.S. Fish and Wildlife Service are known to occur in the project area, with the exception of occasional transient endangered bald eagles (Haliaeetus leucocephalus) or peregrine falcons.

For further information about or assistance with surveys for the small whorled pogonia or the variable sedge, we suggest that you contact John Albright, Maine Natural Heritage Program, State House Station 130, Augusta, Maine 04333, 207-289-6800.

Please notify this office with the results of any surveys for the small whorled pogonia or the variable sedge, so that we may determine whether there may be any impacts to these species. A list of Federally designated endangered and threatened species in Maine, New Hampshire and Vermont is included for your information. Thank you for your cooperation and please contact [redacted] of this office at (603) 225-1411 for further coordination regarding this project.

Exhibit 3-3 Example of a no effect response -

United States Department of the Interior

FISH AND WILDLIFE SERVICE
New England Field Offices
400 Ralph Pill Marketplace
22 Bridge Street, Unit #1
Concord, New Hampshire 03301-4901

RE: Nationwide Wetlands Permit
Drakes Island, Wells, Maine

January 20, 1993

[redacted]
Roaring Brook Consultants
15 Sewall Road
South Berwick, Maine 03908

Dear [redacted]:

We have reviewed your request for information on endangered and threatened species and their habitats for the above referenced project. The Federally listed threatened piping plover (Charadrius melodus) is known to occur on Laudholm Beach, near the proposed project. However, based on the project description and location, it appears that no impacts to Federally listed species will occur. Should project plans change, or if additional information on the distribution of listed or proposed species becomes available, this determination may be reconsidered.

While it is not required for your Federal permit, we suggest that you contact [redacted] Maine Natural Heritage Program, State House Station 130, Augusta, Maine 04333, 207-289-6800 for information on state listed species that may be present.

A list of Federally designated endangered and threatened species in Maine is inclosed for your information.

Sincerely yours,

[redacted]

[redacted]
Endangered Species Specialist

Inclosure

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Exhibit 3-4 Example of a concurrence letter -

[redacted]
Manager-Construction Applications
Columbia Gas Transmission Corporation
Post Office Box 1273
Charleston, WV 25325

Re: Blanket clearance for minor construction projects

Dear [redacted]:

This responds to your request of November 18, 1992, for our concurrence with your approach to handling endangered species review of minor construction projects falling into the following categories specified in your letter:

1. Construction, abandonment, or relocation of points of delivery (PODs). We understand to establish a new POD, an existing pipeline is tapped at a point along a previously disturbed and maintained Right-Of-Way (ROW), and no more than 20 feet of small diameter pipe is installed. Limited aboveground facilities such as valves, separators, meters and small shelters may also be installed. To relocate or abandon a POD, an existing pipeline is cut and capped adjacent to the existing pipeline as previously described at a different location.

2. Construction and/or maintenance projects within existing, previously disturbed, and generally fenced compressor and measuring & regulatory (M&R) stations.

3. Construction and/or maintenance projects along existing, previously disturbed and maintained ROW. We understand from your letter that these minor projects are less than 100 feet in length and include projects for erosion and sedimentation control, cathodic protection installations and repairs to or replacement of facilities.

We concur that the types of activities described above will not adversely affect endangered or threatened species. Therefore, no Biological Assessment or further Section 7 Consultation pursuant to the Endangered Species Act of 1973 is required with the Fish and Wildlife Service for these particular activities. Should additional information on listed or proposed species become available, this determination may be reconsidered.

The above comments are provided in accordance with the Endangered Species Act (87 Stat. 884, as amended; 16 U.S.C. 1531 et seq.). Our comments regarding compliance with the Fish and Wildlife Coordination Act (48 Stat. 401, as amended; 16 U.S.C. 661 et seq.), and the Migratory Bird Treaty Act (40 Stat. 755, as amended; 16 U.S.C. 703 et seq.) were provided in our letter of February 11, 1992. Those comments remain valid.

We appreciate your conscientious efforts to comply with Federal requirements. If you have any questions regarding this letter, please contact [redacted] at (410) 269-5448.

Exhibit 3-5 Example of a nonconcurrence letter

United States Department of the Interior

FISH AND WILDLIFE SERVICE

Chesapeake Bay Field Office
1825 Virginia Street
Annapolis, Maryland 21401
January 11, 1993

[redacted]
District Engineer
Baltimore District, Corps of Engineers
Post Office Box 1715
Baltimore, Maryland 21203

RE: Endangered Species Act concerns relative to CENAB-OP-RP (CHESAPEAKE BEACH, TOWN OF)90-04126-1

Dear [redacted]:

We are writing to express our concerns regarding impacts of the referenced project on the Federally threatened Puritan tiger beetle (Cicindela puritana). Our comments are provided in accordance with Section 7 of the Endangered Species Act (87 stat. 884 as amended; 16 U.S.C. 1531 et seq.).

The project involves construction of a stone revetment and wooden walkway along the Chesapeake Bay at the Town of Chesapeake Beach a short distance north of a bayside cliff that supports a Puritan tiger beetle population. This population represents the northern limit of this beetle on the western shore of the Chesapeake Bay. In 1991, The Corps initiated informal consultation with the Service to determine whether the revetment/walkway project, due to its potential for increasing public access to tiger beetle habitat, might adversely affect the Puritan tiger beetle. As a result of the informal consultation process, it was agreed that the Town would construct and maintain a chain link fence at the northernmost limit of the cliffs supporting this threatened species. The fence was to be tied in to the cliff face and to extend 30 feet channelward of mean high water. The Service concurred that such a fence would decrease public access to the tiger beetle cliffs sufficiently to compensate for the increase in human use of the beach area, thus resulting in a net "no effect" to the beetles. The permit, issued May 14, 1991, was conditioned upon the construction and maintenance of this structure.

On December 15, 1992, we received information from your office indicating that the applicant had requested permission to re-locate the fence some 400 feet to the south of the originally proposed location. On January 7, 1993, the project location was inspected by [redacted] endangered species biologist from our office, [redacted] of your staff, and [redacted] of the Maryland Natural Heritage Program. The fence had been constructed at the revised location, leaving a 400

foot section of cliff that is potential Puritan tiger beetle habitat on the public access side of the fence. Due to this change in the project, we can no longer concur with the "no effect" determination. In order to ensure compliance with the Endangered Species Act, we suggest one of the following courses of action be taken:

(a) The applicant should move the fence to the location specified in the existing permit. Compliance with this original permit condition would satisfy the previously established criterion for "no effect" and would conclude the consultation process for this project.

(b) Alternatively, the Corps should re-examine the project in its present form to determine whether it may affect any endangered or threatened species. If the possibility of an effect cannot be eliminated, the Corps is required to initiate formal consultation with the Service.

If you have any questions regarding this project, please contact [redacted] at the above address, or by telephone at (410) 269-5448. Thank you for your cooperation in the effort to protect endangered and threatened species.

CHAPTER 4 - FORMAL CONSULTATION

"Each Federal agency shall, in consultation with and with the assistance of the Secretary, insure that any action authorized, funded, or carried out by such agency...is not likely to jeopardize the continued existence of any endangered species or threatened species or result in the destruction or adverse modification of habitat of such species which is determined...to be critical.... In fulfilling the requirements of this paragraph each agency shall use the best scientific and commercial data available."

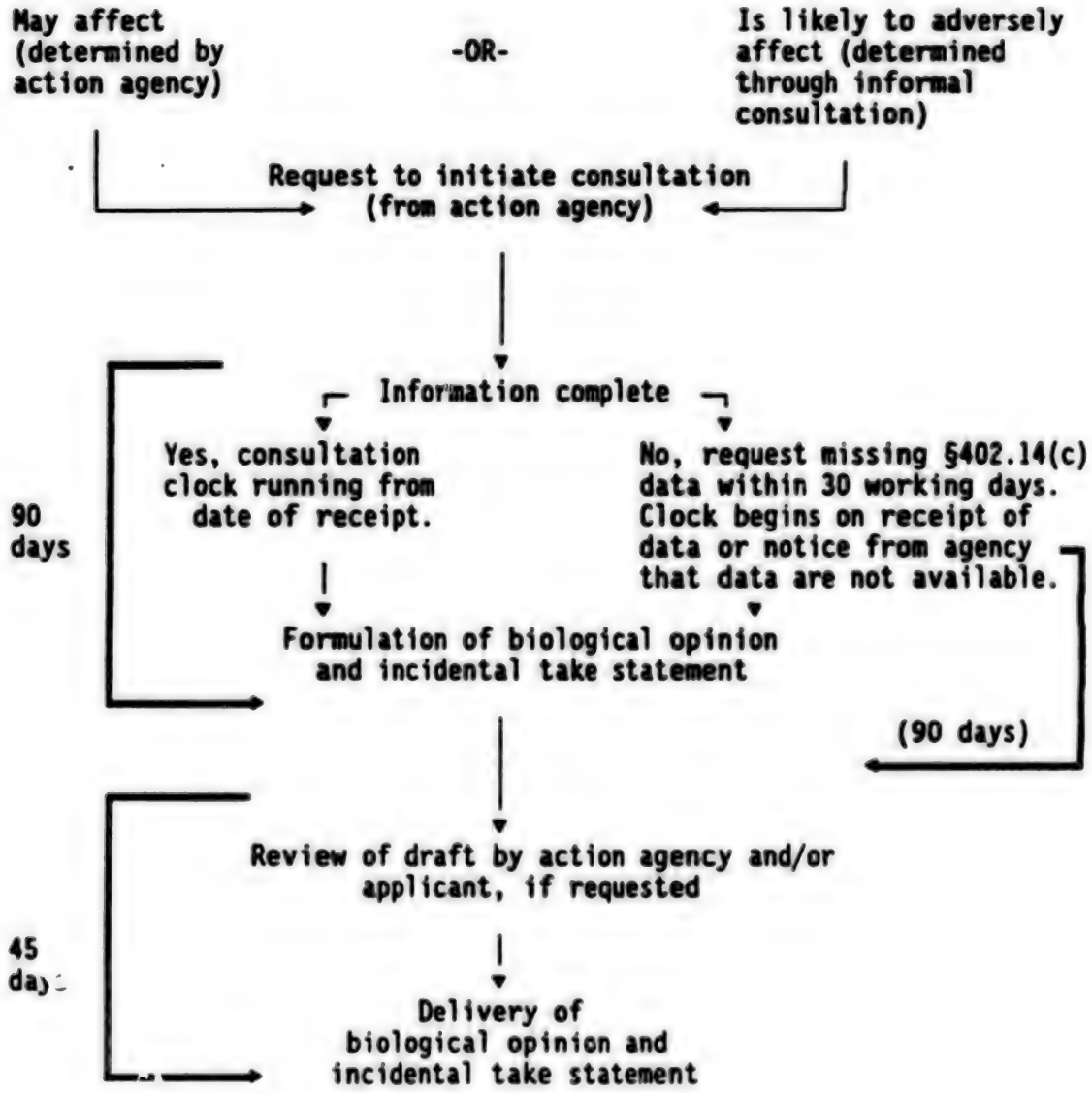
Section 7(a)(2) of the Endangered Species Act

4.1 THE FORMAL CONSULTATION PROCESS

Formal consultations determine whether a project is likely to jeopardize the continued existence of a listed species (jeopardy) or destroy or adversely modify critical habitat (adverse modification) (Figure 4-1). Formal consultations perform several other functions: they (1) identify the nature and extent of the effects of Federal (agency) actions on listed species and critical habitat, (2) identify reasonable and prudent alternatives, if any, when an action is likely to result in jeopardy or adverse modification, (3) may eliminate the liability of action agencies for "take" under section 9 of ESA, (4) require the implementation of reasonable and prudent measures to minimize the impacts of incidental take to listed species, (5) identify ways the action agencies can help conserve listed species or critical habitat when they undertake an action, and (6) provide an administrative record of effects on species that can help establish the species' environmental baseline in future biological opinions.

If an action agency determines a proposed action "may affect" listed species or critical habitat, formal consultation is conducted. An exception occurs when all adverse effects have been avoided. Formal consultation is unnecessary if the proposed action is not likely to adversely affect listed species or critical habitat (Chapter 3). When action agencies request formal consultation on actions not likely to adversely affect listed species or designated critical habitat, the Services provide that consultation.

Figure 4-1. Formal consultation process



4.2 INITIATING FORMAL CONSULTATION

Action agencies initiate formal consultation through a written request to the Services. To comply with the section 7 regulations (50 CFR §402.14(c)), this request must include all of the following:

- a description of the action being considered;
- a description of the specific area that may be affected by the action;
- a description of any listed species or critical habitat that may be affected by the action;
- a description of the manner in which the action may affect any listed species or critical habitat, and an analysis of any cumulative effects;
- relevant reports, including any environmental impact statements, environmental assessments, or biological assessment prepared on the proposal pursuant to section 7(c) of ESA; and
- any other relevant studies or other information available on the action, the affected listed species, or critical habitat.

When dealing with a project involving an EIS, it is desirable to conduct consultation at the draft stage when the preferred alternative is more likely to be known.

The action agency can initiate formal consultation on a number of similar actions within the same geographic area (Programmatic consultation, section 4.7) or a portion of a comprehensive plan (Incremental steps, section 4.4(B)), as long as the effects of the entire action are considered. Any information provided by an action agency must represent the best scientific and commercial data available.

4.3 EVALUATING INITIATION PACKAGES

An action agency's package initiating consultation needs to be reviewed immediately to determine if (1) all of the information required by the regulations has been provided, and (2) that information represents the best scientific and commercial data available. The "other relevant information" requirement gives the Services an opportunity to determine what project-specific information is needed to develop the biological opinion.

4.4 FORMAL CONSULTATION PROCEDURES

(A) Timeframes for Formal Consultation

> *"(1)(A) Consultation under subsection (a)(2) with respect to any agency action shall be concluded within the 90-day period beginning on the date on which initiated or, subject to subparagraph (B), within such other period of time as is mutually agreeable to the Secretary and the Federal agency;*
> *(B) in the case of an agency action involving a permit or license applicant, the Secretary and the Federal agency may not mutually agree to conclude consultation within a period exceeding 90 days unless the Secretary, before the close of the 90th day referred to in subparagraph (A) -*
> *(i) if the consultation period proposed to be agreed to will end before the 150th day after the date on which consultation was initiated, submits to the applicant a written statement setting forth -*
> *(I) the reasons why a longer period is required;*
> *(II) the information that is required to complete the consultation; and*
> *(III) the estimated date on which consultation will be completed; or*
> *(ii) if the consultation period proposed to be agreed to will end 150 or more days after the date on which consultation was initiated, obtains the consent of the applicant to the extension."*
>
> Section 7(b) of the Endangered Species Act

Section 7 regulations require formal consultation be concluded within 90 days of initiation, and the biological opinion delivered to the action agency within the next 45 days. The Services strive to issue all biological opinions within the 90 day period; however, the Regional Director may use the additional 45 days when circumstances warrant.

Formal consultation is "initiated" on the date the request is received, if the action agency provides all the relevant data required by 50 CFR §402.14(c). Within 30 working days, the Services provide written acknowledgement of the consultation request, advises the action agency of any data deficiencies, and requests either the missing data or a written statement that the data are not available. (Exhibits 4-1 and 4-2 are examples of letters with and without all required data.)

During the initial 90-day formal consultation period, the Services may meet or communicate with the action agency and an applicant, if any, to gather any additional information necessary to conduct the consultation. The 90-day period should be used to:

- o assess the status of the species involved;
- o determine the scope of the proposed action, which includes identifying the area likely to be affected directly and indirectly by the proposed action, and cumulative effects;
- o identify adverse effects likely to result in jeopardy to the species and/or adverse modification of critical habitat;
- o develop reasonable and prudent alternatives to an action likely to result in jeopardy or adverse modification;
- o identify adverse effects not likely to jeopardize listed species, but which constitute "take" pursuant to section 9 of ESA;
- o develop reasonable and prudent measures and terms and conditions for the incidental take statement as appropriate; and
- o identify conservation recommendations, as appropriate.

These actions should be undertaken cooperatively with the action agency, thus allowing the Services to develop a better understanding of direct and indirect effects of a proposed action and any cumulative effects in the action area. Action agencies also have the project expertise necessary to help identify reasonable and prudent alternatives and reasonable and prudent measures. These cooperative efforts should be documented for the administrative record.

The Regional Director ensures the biological opinion and incidental take statement are prepared and delivered within 135 days of initiation of formal consultation. The consultation timeframe cannot be "suspended." If the Services needs more time to analyze the data or prepare the final opinion, or the action agency needs time to provide data or review a draft opinion, an extension may be requested by either party. Both the Services and the action agency must agree to the extension. Extensions should not be indefinite, and should specify a schedule for completing the consultation. If an applicant is involved in the project, extension must follow the procedures outlined by section 7(b)(1)(B) of ESA (Exhibit 4-3).

No final opinion will be issued before the 135th day if the action agency is still reviewing the draft. Once the Services receive comments on the draft, the biological opinion is finalized and delivered to the action agency and applicant, if any. If comments on the draft opinion result in major changes or clarifications, the Services can seek an extension. When the Services have not received the agency's comments by the 125th day, the Services check with the action agency (by telephone or in writing) to negotiate an extension. If the Services receive the comments of the action agency less than 10 days before the end of the established deadline (135 days or as established by an agreed upon extension), the Services are automatically entitled to a 10 day extension of that deadline to deliver the opinion.

Example of a letter sent to inform action agencies the Services have received a complete initiation package and will begin formal consultation on a proposed action.

Dear :

This letter acknowledges the U.S. Fish and Wildlife Service's (Service) [date of receipt of letter initiating consultation] receipt of your [date of agency's initiating letter] letter requesting initiation of formal section 7 consultation under the Endangered Species Act. The consultation concerns the possible effects of your proposed [name and location of the action] on [name of listed species and/or critical habitats affected].

All information required of you to initiate consultation was either included with your letter or is otherwise accessible for our consideration and reference. We have assigned log number [log number] to this consultation. Please refer to that number in future correspondence on this consultation.

Section 7 allows the Service up to 90 days to conclude formal consultation with your agency and an additional 45 days to prepare our biological opinion (unless we mutually agree to an extension). Therefore, we expect to provide you with our biological opinion before [date 135 days after receipt of initiation request].

As a reminder, the Endangered Species Act requires that after initiation of formal consultation, the Federal action agency make no irreversible or irretrievable commitment of resources that limits future options. This practice insures agency actions do not preclude the formulation or implementation of reasonable and prudent alternatives that avoid jeopardizing the continued existence of endangered or threatened species or destroying or modifying their critical habitats.

If you have any questions or concerns about this consultation or the consultation process in general, please feel free to contact me or [name of staff member] at [number].

Sincerely,

Field Supervisor

Exhibit 4-2 Example of a letter sent when a complete formal consultation request has not been received.

Dear :

The Fish and Wildlife Service has not received all of the information necessary to initiate formal consultation on [name of the project] as outlined in the regulations governing interagency consultations (50 CFR §402.14). To complete the initiation package, we will require the following information:

1. [Outline the additional information needs. Follow the general sequence and use language that parallels 50 CFR §402.14(c) to identify each piece of information.]

2. etc.

Until we receive all of the information, or a statement explaining why that information cannot be made available, the formal consultation process for the project does not begin. We will notify your office when we receive this additional information; our notification letter will also outline the dates within which formal consultation should be complete and the biological opinion delivered on the proposed action.

If you have any questions or concerns about this consultation or the consultation process in general, please feel free to call me at [number].

Sincerely,

Field Supervisor

Exhibit 4-3 Example of a request for extension of time

United States Department of the Interior

FISH AND WILDLIFE SERVICE
3100 University Blvd. South
Suite 120
Jacksonville, Florida 32216

October 30, 1992

[redacted]
District Engineer
U.S. Army Corps of Engineers
P.O. Box 4970
Jacksonville, Florida 32232-0019

FWS Log No: 4-1-92-441C
Application No: 199201162(LP-CRFO)
Dated: August 6, 1992
Applicant: [redacted]
County: Citrus

Dear [redacted]

On . 1992, the Fish and Wildlife Service entered into formal Section 7 consultation on the above referenced public notice. The 90-day consultation period expires November 4, 1992. Because of the difficulties we have encountered in acquiring additional information from the applicant, we request a 60-day extension of the consultation period in accordance with 50 CFR Part 402.14(e). The Biological Opinion will be issued before January 3, 1993.

We have been awaiting necessary information (i.e. plat maps) showing the amount of shoreline owned or controlled by the applicant and information on the number and sizes of existing docks. We requested shoreline information from them in writing on August 13, 1992, and on September 1, 1992, we requested maps showing both shoreline and dock information. We asked for this information again in a telephone conversation with their agent on October 14, 1992. Maps have still not been provided, however, the applicant's wife provided us with a verbal description of the map and the existing docks in a telephone conversation on October 29, 1992. Additional time is needed to review this information and prepare the biological opinion.

By copy of this letter, we are notifying the applicant of our request of an extension. We look forward to your response.

Sincerely yours,

(B) Incremental steps

When a statute authorizes an agency to complete an action in incremental steps, the Services shall, at the request of the action agency, issue a biological opinion on the incremental step being considered. That opinion also includes the Services' views on the entire action (50 CFR §402.14(k)). An action agency may proceed with the proposed action after consultation, when:

- o the biological opinion does not conclude that the incremental step would violate section 7(a)(2);
- o the agency continues consultation with respect to the entire action, and obtains biological opinions, as required, for incremental steps;
- o the action agency fulfills its continuing obligation to obtain sufficient data upon which to base the final biological opinion on the entire action;
- o the incremental step does not violate section 7(d) concerning irreversible or irretrievable commitment of resources; and
- o there is a reasonable likelihood that the entire action will not violate section 7(a)(2) of ESA.

Consultation for the first phase of an incremental step action must be conducted formally to address these five factors. If no adverse effect is likely for intermediate steps, consultation may be conducted informally for such steps.

Incremental step consultation is most appropriate for long-term, multistaged activities for which agency actions occur in discrete steps, such as the development of oil and gas resources on the Outer Continental Shelf. However, in Conner v. Burford, 848 F.2d 1441 (9th Cir. 1988), cert. denied, 109 S.Ct. 1121 (1989), the Ninth Circuit Court of Appeals disallowed the incremental step consultation approach for onshore oil and gas leasing and made clear the burden it expects action agencies to carry:

> *In light of the ESA requirement that the agencies use the best scientific and commercial data available to insure that protected species are not jeopardized, 16 U.S.C. §1536(a)(2), the FWS cannot ignore available biological information or fail to develop projections of oil and gas activities which may indicate potential conflicts between development and the preservation of protected species. We hold that the FWS violated the ESA by failing to use the best information available to prepare comprehensive biological opinions considering all stages of the agency action, and thus failing to adequately assess whether the agency action was likely to jeopardize the continued existence of any threatened or endangered species, as required by section 7(a)(2). To hold otherwise would eviscerate Congress' intent to "give the benefit of the doubt to the species."*

848 F.2d at 1454 (footnote omitted).

The Services should follow the ruling in Conner on all consultations for proposed on-shore oil and gas leases and other activities on Federal lands located within the following Ninth Circuit States: Alaska, Arizona, California, Hawaii, Idaho, Montana, Nevada, Oregon, and Washington.

The question has been raised about whether this approach is inconsistent with the consultation regulations. The Conner court stated that Service regulations on section 7 consultation limit the incremental-step consultation process to activities that are statutorily segmented. See 848 F.2d at 1457 n.38. Under 50 CFR §402.14(k), an opportunity for incremental review exists when an activity is "authorized by a statute that allows the agency to take incremental steps toward the completion of the action." The Department of the Interior believes the incremental steps need not be statutorily-mandated to meet the requirements of §402.14(k), and has long held that the Mineral Leasing Act allows the use of a segmented decisionmaking process. Therefore, Service regulations do not prevent evaluating on-shore mineral leasing activities through incremental-step consultation. This disparity between Interior Department practice and the wording of the Ninth Circuit opinion in Conner does not require a revision to the section 7 regulations. Continued use of the incremental step activities in areas outside the jurisdiction of the Ninth Circuit can still be achieved without regulatory amendment.

4.5 COMPONENTS OF A FORMAL CONSULTATION

A formal consultation package includes at least a biological opinion and an incidental take statement. The package also may include a conference opinion or notice of a need to confer if proposed species or proposed critical habitats are involved, as well as conservation recommendations for agency implementation of section 7(a)(1) responsibilities if relevant to the action under consultation (Figure 4-2).

Although other environmental reviews (including Fish and Wildlife Coordination Act reports and NEPA analyses) may be compiled simultaneously with a section 7 consultation package, they should be separate entities. The contents of the biological opinion and incidental take statement, including effects to listed or proposed species or critical habitats, and appropriate measures to avoid or minimize those effects, may be addressed in Service comments and recommendations under the Fish and Wildlife Coordination Act, section 404(m) of the Clean Water Act, the National Environmental Policy Act, and other authorities. The consultation package may be prepared as a stand-alone document under separate signature, or one cover transmittal may be used as long as the consultation package is identified as a separate entity.

A sample of a formal consultation package can be found in Appendix B.

Following the address and salutation, the biological opinion begins with a standardized introduction and a history of the consultation.

Introductory paragraph

> The U.S. Fish and Wildlife Service (Service) has reviewed the [project plans, permit application, etc.] for the following activity [name or designation for the action] located in (County or state). Your (date) request for formal consultation was received on (date). This document represents the Service's biological opinion on the effects of that action on (species) in accordance with section 7 of the Endangered Species Act of 1973, as amended, (16 U.S.C. 1531 et seq.).
>
> This biological opinion is based on information provided in the (date) biological assessment (or evaluation), the (date) draft environmental assessment (or environmental impact statement), the (date) project proposal, telephone conversations of (dates) with (names), field investigations, and other sources of information. A complete administrative record of this consultation is on file in (this office/elsewhere).

Consultation history

The history of the consultation request includes any informal consultation, prior formal consultations on the action, documentation of the date consultation was initiated, a chronology of subsequent requests for additional data, extensions, and other applicable past or current actions. Conclusions reached in earlier informal and formal consultations on the proposed action also may be relevant. For example, through informal consultation, the Services may have determined that some species will not be adversely affected by the action and assumes that the conclusion remains valid.

Figure 4-2 Outline of a formal consultation package
[Handbook discussion in brackets]

Address

Salutation

Introductory paragraph [page 4-11]

Consultation history [page 4-12]

BIOLOGICAL OPINION

Description of proposed action [page 4-14]

Status of the species (range wide and/or recovery unit) [page 4-19]

Environmental baseline (in the action area) [page 4-23]

- o Status of the species [page 4-23]
- o Effects of the action [page 4-24]
- o Cumulative effects [page 4-29]

Conclusion [page 4-31]

Reasonable and prudent alternatives (as appropriate) [page 4-40]

INCIDENTAL TAKE STATEMENT [page 4-42]

Introductory paragraph [page 4-44]

Amount or extent of take [page 4-45]

Effect of the take [page 4-47]

Reasonable and prudent measures (as appropriate) [page 4-48]

Terms and conditions [page 4-49]

CONFERENCE REPORT/CONFERENCE NOTICE (as appropriate) [page 4-54]

CONSERVATION RECOMMENDATIONS (as appropriate) [page 4-55]

REINITIATION - CLOSING STATEMENT [page 4-56]

LITERATURE CITED [page 4-56]

(A) Biological opinion

> ***"... the Secretary shall provide to the Federal agency and the applicant, if any, a written statement setting forth the Secretary's opinion, and a summary of the information on which the opinion is based, detailing how the agency action affects the species or its critical habitat. If jeopardy or adverse modification is found, the Secretary shall suggest those reasonable and prudent alternatives which he believes would not violate subsection (a)(2) and can be taken by the Federal agency or applicant in implementing the agency action.***
>
> **Section 7(b)(3)(A) of the Endangered Species Act**

A formal biological opinion consists of a description of the proposed action, status of the species, the environmental baseline, cumulative effects, the Services' conclusion of jeopardy/no jeopardy and/or adverse modification/no adverse modification and reasonable and prudent alternatives, as appropriate.

Description of the proposed action

Provide descriptions of the proposed action and the action area (area including all direct and indirect effects) here. The description of the proposed action does not have to be comprehensive if details can be referenced from NEPA documents or other descriptions provided. However, some small actions may not have complete or formal descriptions of the proposed action, or the project's components may be scattered throughout a biological evaluation (or similar document), draft NEPA documents, draft plans for different portions of the action, miscellaneous policy and guidance documents, letters, telephone records, meeting notes, and other documents. In such cases, a comprehensive project description in the biological opinion is vital to determine the scope of the proposed action. The draft project description may be sent to the action agency for review to eliminate any inaccuracies regarding the scope of the action. This section should summarize enough information for the reader to understand and evaluate the logic of the biological opinion.

As appropriate, including a transition sentence clarifies how the action area was changed or expanded for the effects analysis: "The Services have expanded the action area to .... for reasons that will be explained and discussed in the 'Effects of the proposed action' section of this consultation." Maps and other graphics also may be appropriate.

Occasionally, an action agency or an applicant disagrees with the delineation of the action area. This generally occurs when impacts to the species/habitat result from indirect or interrelated/interdependent effects. Reaching agreement on the area of project influence is desirable, but ultimately the Services are responsible for this biological determination (Figures 4-3, 4-4 and 4-5).

Figure 4-3 Diagram of the action area concept for section 7 consultation.

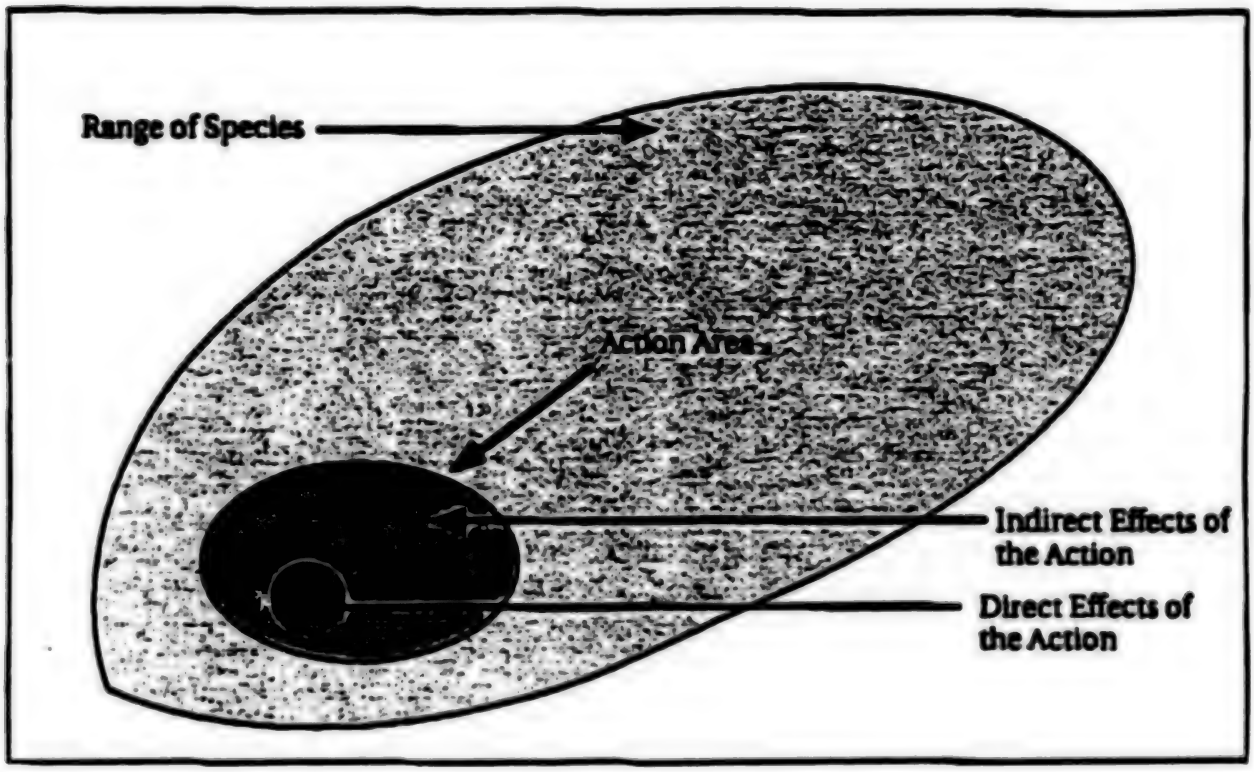


Figure 4-4 Example of an action area that encompasses the species' range.

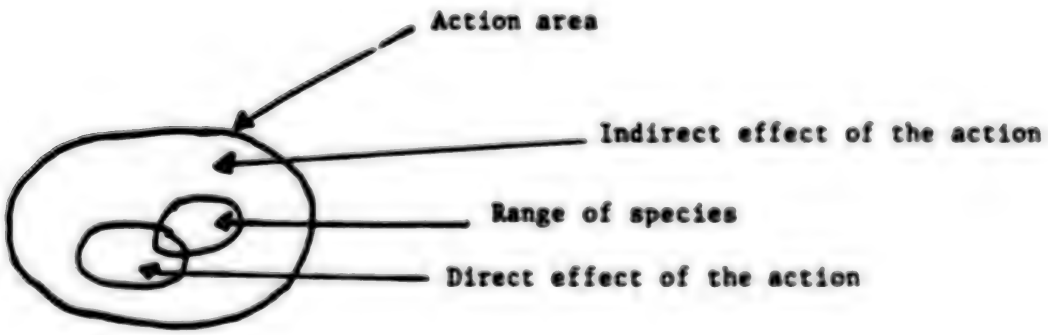
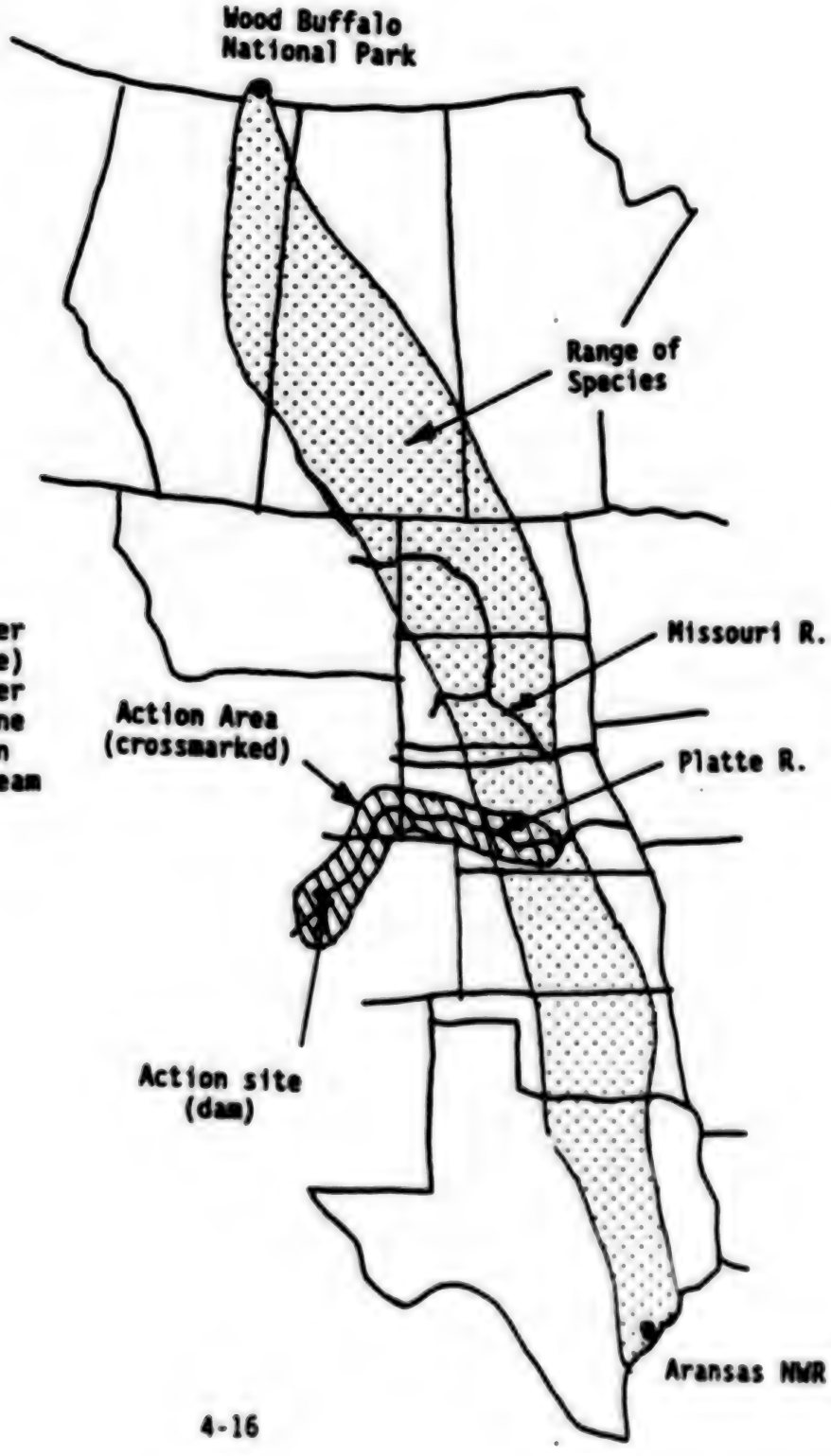


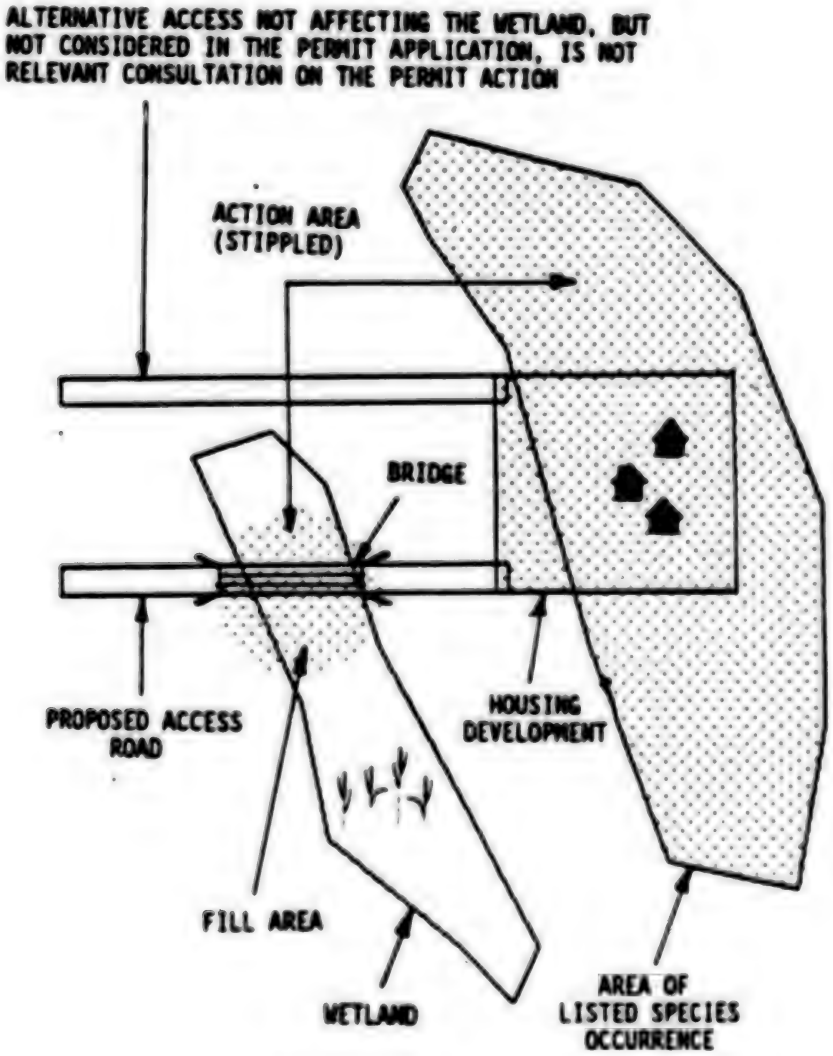
Figure 4-5 Example of an action area involving a water project.

A dam on the Platte River in Colorado (action site) also may affect the water regime for whooping crane critical habitat (action area) 150 miles downstream in Nebraska.



Additionally, determining the action area relates only to the action proposed by the action agency. Even if the applicant has an alternative not requiring Federal permits or funding, this does not enter into the Services' analyses. Such alternatives can be discussed in the reasonable and prudent alternatives or conservation recommendations if the alternative is within the agency's jurisdiction. For example (Figure 4-6), if the proposed action is a wetland fill to accommodate access to a proposed development (the actual area of impact to the species), the development is not excluded from the action area whether or not the applicant can build a road not impacting the wetland or when the action agency maintains they cannot consider indirect effects. If the applicant is seriously considering the alternative with no Federal nexus the applicant should be advised of the need for acquiring a section 10(a)(1)(B) permit before development for actions that will result in a taking.

Figure 4-6 Determining the action area.



Describing the proposed action also includes any conservation measures proposed as part of the action. When used in the context of the Endangered Species Act, "conservation measures" represent actions pledged in the project description that the action agency or the applicant will implement to facilitate recovery of the species under review. Such measures may be tasks recommended in the species' recovery plan, should be closely related to the action, and should be achievable within the authority of the action agency or applicant. For example, degraded habitat acquired by the applicant adjacent to the area to be developed is to be improved prior to project completion so that individuals depending on the habitat to be destroyed by development can be relocated or allowed to relocate on the improved site.

In this example, the activity carries out a recognized conservation need for the species. The beneficial effects of the conservation measure are taken into consideration for both jeopardy and incidental take analyses. However, if the conservation measure includes only off-site protection and does not protect affected individuals in the action area, the analysis for incidental take is made independently of the conservation measure. Discussion of the limits for minimization under section 7, and distinction from mitigation allowances under section 10, can be found on pages 2-4 and 2-5 of this handbook.

Unlike conservation measures, conservation recommendations, which may be provided at the end of the consultation package, are discretionary suggestions for implementation by the agency or applicant.

Status of the species

Background information

This section describes the current status of the species as listed and critical habitat as designated at the time of the consultation.

a. Species description

This section should briefly discuss the listing history, critical habitat, and current known range of all species.

b. Life history

A large number of life history variables are relevant to jeopardy analyses. These variables help determine a species' population size, age distribution, sensitivity to a proposed action's effects, ability to recover from adverse effects, and ability to recolonize areas from which it has been extirpated. Relevant life history variables include, but are not limited to, longevity, age distribution, age to maturity, reproductive strategy (for example, the number of times mature individuals reproduce in a lifetime, or whether mature individuals reproduce sexually or asexually), recruitment, seasonal distribution patterns, biogeography, food habits, niche, life cycle, hosts and symbionts, predators and competitors, and disease factors.

c. Population dynamics

Population size: This species' characteristic is often emphasized in consultations. Reduction in population size may jeopardize the continued existence of threatened or endangered species because the longer a species remains at low population levels, the greater the probability of extinction from chance events, inbreeding depression, or additional environmental disturbance (Gilpin and Soule 1986, Goodman 1987a, 1987b, Pimm 1991, Schaffer 1987, Underwood 1989). However, although population size has a clear relationship to a species' extinction probability, it can be less important than population variability and should be used carefully. How long a species will last before extinction depends on more than population size. Large populations may not protect a species from extinction in the face of extreme environmental disturbance (Pimm 1991, Underwood 1989, Schaffer 1987).

Population variability: Fluctuations in species' population over time can affect significantly the probability of its extinction (Pimm 1991). Population variability is affected by several characteristics of a species' life history: unstable age distributions and reproductive rates, widely variable mortalities resulting from unstable food resources or predation; population density; sex ratios; recolonization rates; and genetic viability (Pimm 1991, Underwood 1989). As a population fluctuates, one or more factors can lead to a chance extinction, e.g., irreversibly lowering population size to a point where it can no longer recover. Consequently, an action increasing a species' population variability may affect the continued existence of the species more significantly than a reduction in population size.

Population stability: Population stability - the ability of a species' populations to resist change or dramatic fluctuations over time - directly affects a species' sensitivity to the adverse effects of a proposed action. Even age distribution, high reproductive rates, or long life spans with multiple reproductive periods can stabilize a population.

d. Status and distribution

Information on the status and distribution of listed species helps establish the environmental basis for a consultation. The following factors should provide a reasonable environmental setting within which to consider the action and cumulative effects for the consultation.

Reasons for listing: The reasons for listing a species are important considerations. A species listed because of commercial exploitation may be less sensitive to habitat loss than a species listed because of habitat loss.

Rangewide trend: With most listed species declining throughout their range, the overall trend of a species throughout its range has implications for new proposals that could result in additional effects on the species. The trends of the remaining populations of listed species form the basis for evaluating the effects of a proposed action on that species.

New threats: Often factors not considered when a species was first listed can threaten its continued existence, and must be considered when establishing the environmental baseline. For example, the zebra mussel (*Dreissena polymorpha*), an exotic species threatening native mussel fauna throughout its range, wasn't considered when most native mussels were listed.

e. Species' response to a proposed action

[Note: For critical habitat analyses, many of the following considerations apply in terms of the effect on the functional suitability of the habitat to support the species.]

Numbers of individuals/populations in the action area affected: Many jeopardy analyses emphasize the effects of a proposed action on the size of a species' populations because small populations are more threatened by extinction due to demographic accidents than large populations. However, the length of time a species exists before extinction depends on more than population size. Large population size may not protect a species in the face of extreme disturbance (Pimm 1991, Schaffer 1987). A species' response to disturbance will depend on the number of individuals affected, though the age, sex, breeding status, and distribution of affected individuals, as well as the genetic variabilty within the remaining population(s), are equally important because they determine a population's ability to recover from the loss of individuals.

Sensitivity to change: This factor relates to the degree to which a population or species is prone to change when disturbed.

Resilience: This factor relates to the characteristics of populations or species allowing them to recover from different magnitudes of disturbance. For example, the greater the reproductive rate, the more resilient the species may be to population losses. Moreover, habitat specificity and other factors also contribute to a species' resiliency. Critical habitat also has resilience: grasslands, for example, can be more resilient to the adverse effects of fire than a forest. In a biological opinion, the biologist should determine the type and severity of the disturbance and determine how resilient the species is to that particular type of disturbance.

Recovery rate: This factor relates to the time required for an individual, population, species, or community to return to equilibrium after exposure to a disturbance. A population, species, community, or ecosystem that has a fast recovery rate is called stable. It is often difficult to know the recovery rate or resilience of species. In the absence of information, the best biological estimate should be used.

Literature cited

Gilpin, M.E. and M.E. Soule. 1986. Minimum viable populations: processes of species extinction. pp. 18-34. In: M.E. Soule (ed.) Conservation biology: the science of scarcity and diversity. Sinauer Associates, Inc.; Sunderland, Massachusetts.

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Harrison, G.W. 1979. Stability under environmental stress: resistance, resilience, persistence, and variability. American Naturalist 113:659-669.

Innis, G. 1974. Stability, sensitivity, resilience, persistence. What is of interest? pp.131-139. In: S. Levin (ed.) Ecosystem analysis and prediction. SIAM; Philadelphia, Pennsylvania.

Pimm, S.L. 1991. The balance of nature: ecological issues in the conservation of species and communities. University of Chicago Press; Chicago, Illinois.

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Trudghill, S.T. 1988. Soil and vegetation systems. Second edition. Oxford University Press; New York, New York.

Underwood, A.J. 1989. The analysis of stress in natural populations. Biological Journal of the Linnean Society 37:51-78.

Analysis for status of the species

This discussion identifies only those species likely to be adversely affected, unless the Federal agency requests consultation on a beneficial action. Other listed species present in the project area also are noted here along with the reasons they are not adversely affected, and a statement they will not be considered further in the consultation. This section also should include the date of the listing, description of critical habitat, if designated, and description of the current known range of the species.

This section presents the biological or ecological information relevant to formulating the biological opinion. Appropriate information on the species' life history, its habitat and distribution, and other data on factors necessary to its survival, is included to provide background for analyses in later sections. This analysis documents the effects of all past human and natural activities or events that have led to the species' current status. This information is presented in listing documents, and refined in recovery plans.

When Service review focuses on the effects of the action on a discrete recovery unit, this section describes the status of that recovery unit and its significance to the species as listed. For example, if the opinion focuses on the Chesapeake Bay recovery unit of the bald eagle, the status of that recovery unit is discussed including the recovery unit's role to both the survival and recovery of the species as listed.

Environmental baseline

The environmental baseline is an analysis of the effects of past and ongoing human and natural factors leading to the current status of the species or its habitat and ecosystem.

Status of the species within the action area

Unless the species' range is wholly contained within the action area, this analysis is a subset of the preceding rangewide status discussion. The purpose is to analyze the effects on the species and/or critical habitat at the local level. For example, the following issues are considered:

- the percent or amount of the species range in the action area;
- whether the effect is quantitative or qualitative;
- the distribution of the affected and unaffected habitat; and
- if critical habitat, the effect on the constituent elements.

This analysis describes the status of the species and factors affecting the environment of the species or critical habitat in the proposed action area during the consultation (Figure 4-3). The baseline includes State, local, and private actions already affecting the species. Unrelated Federal actions that have completed formal or informal consultation also are part of the environmental baseline, as are Federal and other actions within the action area that may benefit listed species or critical habitat.

An agency action can be removed from the environmental baseline under any of the following conditions:

- an action agency notifies the Services in writing that a previously proposed action will not be implemented;
- a biological opinion for the proposed action is no longer valid because consultation has been reinitiated; or
- alternatives have been implemented that remove all adverse effects.

Effects of the action

This section includes a multifaceted analysis describing direct and indirect effects on the species or critical habitat from the proposed action and its interrelated and interdependent activities.

a. Action parameters to consider

Proximity of the action: to the species or management units.

Distribution: geographic areas over which the disturbance occurs (e.g., may be several small or one large effect).

Timing: relationship to sensitive periods of a species' lifecycle.

Nature of the effect: effects of the action on elements of a species' lifecycle, population size or variability, or distribution, including direct and indirect effects.

Duration: three categories pertaining to the length of time of a disturbance produced by a proposed action: (1) a short-term event whose effects are relaxed almost immediately (pulse effect), (2) a sustained, long-term, or chronic event whose effects are not relaxed (press effect), or (3) a permanent event that sets a new threshold for some feature of a species' environment (threshold effect). The effects of a proposed action on listed species or critical habitat depend largely on the duration of its effects. For many species, a proposed action that produces a single, short-term effect is less likely to jeopardize the continued existence of a species than a long-term chronic event or the permanent alteration of a species' habitat.

Disturbance frequency: the mean number of events per unit time affecting a species differently depending on its recovery rate. If the disturbance frequency is greater than a species' recovery rate, the species will be unable to recover between disturbances (Figure 7d). If the disturbance frequency equals the species' recovery rate, the species becomes more sensitive to the effects of other disturbances (Figure 7c). If the disturbance frequency is less than the species' recovery rate, the species might persist in the face of the disturbance (Figures 7a-b). Disturbance frequency is an important consideration when evaluating the accumulating effects of proposed actions on listed species, particularly when it is combined with information on a species' recovery rate (figures modified from Trudghill 1988).

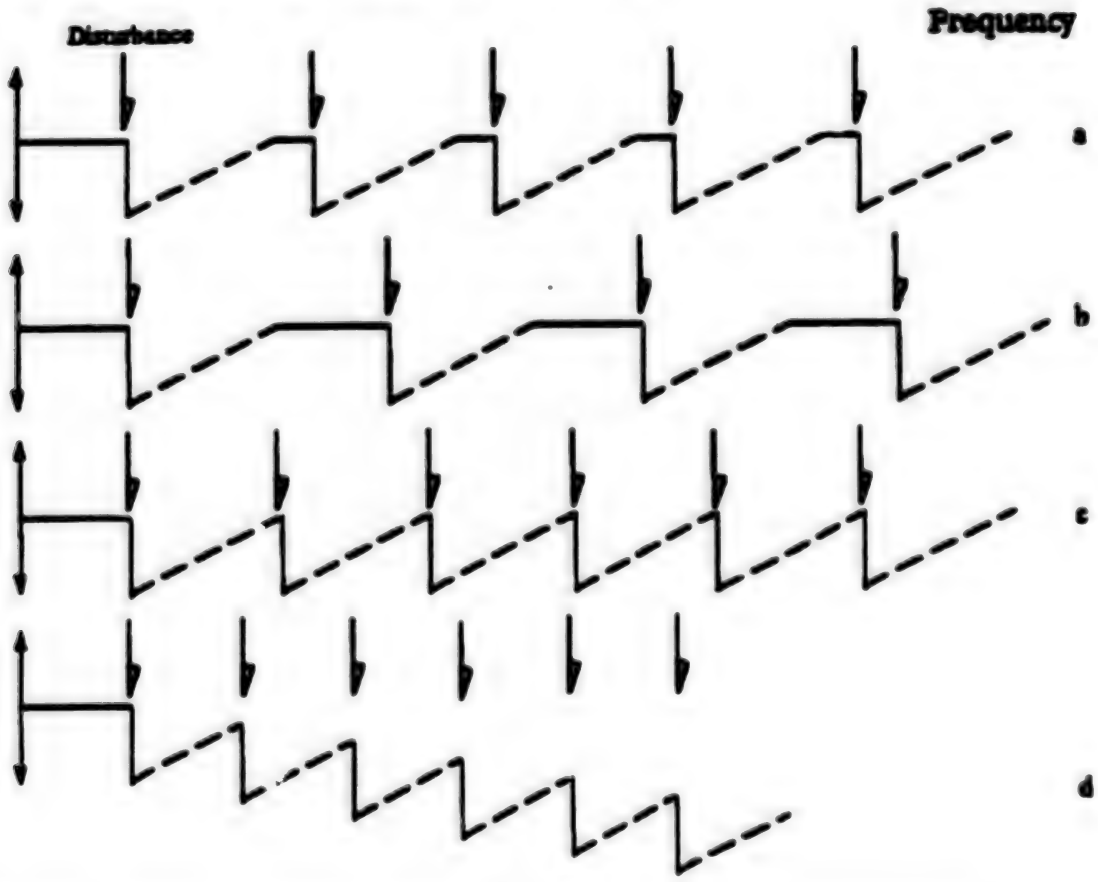


Figure 7 The effects of disturbance frequency on system response. (a-b) the recovery rate is greater than the disturbance frequency, (c) the recovery rate is equal to the disturbance frequency, making the system potentially more sensitive to other disturbances, (d) the recovery rate is lower than the disturbance frequency and the system slowly deteriorates.

Disturbance intensity: the effect of the disturbance on a population or species as a function of the population or species' state after the disturbance. For example, a disturbance reducing the size of a population by 40 percent is more intense than a disturbance reducing population size by 10 percent.

Disturbance severity: the effect of a disturbance on a population or species as a function of recovery rate. The longer the recovery rate, the more severe the disturbance. For example, a disturbance from which a species takes 10 years to recover is more severe than a disturbance requiring 2 years for recovery. A severe disturbance makes a population or species more susceptible to the effects of multiple actions.

b. Analyses for effects of the action

Sufficient description of the proposed action should be included so that the subsequent analysis of effects and the scope of the opinion are clear.

Direct effects: encompass the direct or immediate effect of the project on the species or its habitat, e.g., driving an off road vehicle through the nesting habitat of the piping plover may destroy its ground nest; building a housing unit may destroy the habitat of an endangered mouse. Direct effects result from the agency action including the effects of interrelated actions and interdependent actions (see definitions below for clarification). Future Federal actions not meeting one or more of these criteria (and not included in the environmental baseline or are treated as indirect effects) are not considered in this biological opinion.

Determining if an action is interdependent or interrelated depends on the "but for" test. Ask whether the Federal, State, or private activity could occur "but for" the proposed action.

Interrelated actions are part of a larger action and depend on the larger action for their justification.

> Examples: A section 404 permit for a dam provides water to private irrigation channels. The private irrigation channels are interrelated and must be considered in a biological opinion for the larger water development project.
>
> DOE proposes to build a powerline to connect two proposed electrical power grids. The powerline is part of a larger action (the power grids), which identifies the proposal's action area.

Interdependent actions are actions having no independent utility apart from the proposed action.

> Examples: In the dam example, a power turbine on the dam cannot function without the dam and is therefore interdependent with the project. Thus effects of this turbine on fish passage and water quality are considered in the biological opinion.
>
> With the powerline, an electrical service or utility line is proposed as a step down off the connecting power line to service a ground water pump. This service line and the pump have no independent utility without the powerline.

When one or more Federal actions are determined by the Services to be interdependent or interrelated to the proposed action, or are indirect effects of the proposed action, they are combined in the consultation and a lead agency is determined for the overall consultation.

Indirect effects: are caused by or result from the proposed action, are later

in time, and are reasonably certain to occur, e.g., the newly hatched piping plover falls into the track left by the ORV and cannot escape its predators; the people moving into the housing unit bring cats that prey on the mice left in the adjacent habitat.

Indirect effects may include other Federal actions that have not undergone section 7 consultation but will result from the action under consideration. In order to treat these actions as indirect effects in the biological opinion, they must be reasonably certain to occur, as evidenced in appropriations, work plans, budgeting; they follow a pattern of activity undertaken by the agency in the action area; or they are a logical extension of the proposed action.

Non-Federal activities with indirect effects also can be predicted, particularly for ongoing projects with a past pattern of use anticipated to continue.

> Example: A very complex example of indirect effects arose in determining effects of renewing water service contracts from a large reclamation project (Friant unit of the Central Valley Project) in the San Joaquin Basin of California. Upon checking with other Federal and State agencies, the FWS determined that the distribution of water for agricultural use on the higher east side of the Valley provided a hydrologic head maintaining the groundwater table on the west side of the Valley at a level making it economical to pump. As a result, occupied habitats for several species on the west side of the Valley were being destroyed because the pumped water could be used to convert this land to agriculture. The California Department of Water Resources provided trend data indicating a continuing conversion of habitat of 10,000 to 30,000 acres per year. These data were used to assess future non-Federal effects of the project.

Several court cases provide examples of indirect effects of a proposed action. In National Wildlife Federation v. Coleman, 529 F.2d 359 (5th Cir.), cert. denied, 429 U.S. 979 (1976), the court ruled that indirect effects of private development resulting from proposed construction of highway interchanges had to be considered as impacts of a proposed Federal highway project, even though the private development had not been planned at the time the highway project was proposed. In another case, Riverside Irrigation District v. Andrews, 758 F.2d 508 (10th Cir. 1985), the court ruled that the Corps of Engineers must consider the effects of consumptive water uses made possible by the proposed dam on critical habitat for whooping cranes 150 miles away, in addition to the local impacts of placing fill for the dam.

If the analyses for this section determine that some individuals of a listed animal might be "taken" as a direct or indirect result of the proposed action, that information is included in the incidental take statement.

Determining the effect of ongoing water projects: Under the Federal Power Act, as amended by the Electric Consumers Protection Act of 1986, the Federal

Energy Regulatory Commission (FERC) issues new licenses for existing hydropower projects as the original licenses expire. FERC has determined these new licenses represent a new commitment of resources. Therefore, a section 7 analysis of the project's effects on listed species is done in the same way as new projects. The following approach is used when analyzing these water projects, as well as water contract renewals for Bureau of Reclamation (Bureau) programs and ongoing discretionary operations of Bureau and Corps of Engineers water facilities.

- The total effects of all past activities, <u>including effects of the past operation of the project</u>, current non-Federal activities, and Federal projects with completed section 7 consultations, form the environmental baseline;

- To this baseline, future direct and indirect impacts of the operation over the new license or contract period, including effects of any interrelated and interdependent activities, and any reasonably certain future non-Federal activities (cumulative effects), are added to determine the total effect on listed species and their habitat.

- The action's direct effects may be determined by analyzing the run of the river with and without the project.

Annual operating permits issued prior to issuance of a new hydropower license are subject to section 7 consultation if the Federal agency has discretion to determine the terms of the annual permits.

Cumulative effects

Section 7 regulations require the Federal action agency to provide an analysis of cumulative effects, along with other information, when requesting initiation of formal consultation. Additionally, the Services are required to consider cumulative effects in formulating its biological opinions (50 CFR §402.14(g)(3) and (4)). The standardized paragraph to introduce the cumulative effects section is:

> Cumulative effects include the effects of future State, local or private actions that are reasonably certain to occur in the action area considered in this biological opinion. Future Federal actions that are unrelated to the proposed action are not considered in this section because they require separate consultation pursuant to section 7 of ESA.

The concept of cumulative effects is frequently misunderstood as it relates to determining likely jeopardy or adverse modification. Cumulative effects include effects of future State, local, and private actions, not involving a Federal action, that are reasonably certain to occur within the action area under consideration. Future Federal actions requiring separate consultation (unrelated to the proposed action) are not considered in the cumulative effects section.

The "reasonably certain to occur" clause is a key factor in assessing and applying cumulative effects in biological opinions. First, cumulative effects involve only future non-Federal actions: past and present impacts of non-Federal actions are part of the environmental baseline. Indicators of effects "reasonably certain to occur" may include, but are not limited to: approval of the action by State or local agencies or governments (e.g., permits, grants); indications by State or local agencies or governments that granting authority for the action is imminent; project sponsors' assurance the action will proceed; obligation of venture capital; or initiation of contracts. The more State or local administrative discretion remaining to be exercised before a proposed non-Federal action can proceed, the less there is a reasonable certainty the project will be authorized. Speculative non-Federal actions that may never be implemented are not factored into the "cumulative effects" analysis. At the same time, "reasonably certain to occur" does not require a guarantee the action will occur. The action agency and the Services should consider the economic, administrative, and legal hurdles remaining before the action proceeds.

The cumulative effects analysis is the last step or factor considered in formulating the biological opinion. Sometimes, cumulative effects can be the deciding factor in determining the likelihood of jeopardy or adverse modification. However, this is frequently the least documented part of biological opinions, due to the lack of definitive information on future State, local, or private actions.

Gathering information on cumulative effects often requires more effort than gathering information on a proposed action. One of the first places to seek cumulative effects information is in documents provided by the action agency such as NEPA analyses for the action. The Services can review the broader NEPA discussion of cumulative effects, and apply ESA's narrower cumulative effects definition. Information on future non-Federal actions also can be obtained through observations and inquiries during field reconnaissance in the action area; discussions with State game and fish agencies and other Federal, State, and local agencies, and conservation organizations; and newspapers and other sources of local information (e.g., radio, television, libraries).

When addressing a section 7 action within a larger section 10(a)(1)(B) planning area, non-Federal proposals for development in the Habitat Conservation Plan are considered cumulative effects for that planning area until the section 7 consultation for the section 10(a)(1)(B) permit is completed, at which time the effects of those developments become part of the baseline for future consultations.

> Example: Formal consultation was conducted with the Federal Highway Administration (FHWA) on construction of a new highway in Latimer County, Oklahoma. The endangered American burying beetle is known to use forest and forest/edge habitats within the immediate area of the highway, and activities disturbing the soil surface of the beetle's habitat can impact reproduction. Intensive surface mining for coal and natural gas development were occurring in Latimer County and within the action area. Both of these activities would "benefit" from the new highway, but were independent of the highway construction. Coal mining, regulated by the Office of Surface Mining, was not considered a cumulative effect because it requires section 7 consultation. Future natural gas development is a cumulative effect as it is regulated by the State drilling permits. The frequent occurrence of new drilling sites in the area indicated this activity was "reasonably certain to occur" in the future. Further, several landowners in the action area had recently signed contracts to sell their mineral rights to gas companies.

Conclusion

This section presents the Services' opinion regarding whether the aggregate effects of the factors analyzed under "environmental baseline", "effects of the action", and cumulative effects in the action area, when viewed against the status of the species as listed, are likely to jeopardize the continued existence of the species or result in destruction or adverse modification of critical habitat.

Note: Conditional no jeopardy biological opinions (a conclusion of no jeopardy if the action agency undertakes certain mitigative measures) do not comply with section 7 regulations or the intent of ESA. The Services can evaluate only the Federal action proposed, not the action as the Services would like to see it modified.

The standardized statement for introducing the conclusion section is as follows:

> After reviewing the current status of (species), the environmental baseline for the action area [use if different from the range of the species], the effects of the proposed (action) and the cumulative effects, it is the Service's biological opinion that the (action), as proposed, (is/is not) likely to jeopardize the continued existence of the (species), and (is/is not) likely to destroy or adversely modify designated critical habitat. [If no critical habitat has been designated for the species or the action will not effect designated critical habitat, use one of the following statements.] No critical habitat has been designated for this species, therefore, none will be affected. -OR- Critical habitat for this species has been designated at (location), however, this action does not affect that area and no destruction or adverse modification of that critical habitat is anticipated.

This section address only two issues: whether the proposed action is likely to (1) jeopardize the continued existence of a listed species or (2) result in the destruction or adverse modification of critical habitat. The acceptable conclusions for this section of a biological opinion are as follows:

Jeopardy:

> Likely to jeopardize the continued existence of [one or more species]
>
> Not likely to jeopardize the continued existence of [one or more species]

Note: if the consultation is a reinitiation for consideration of effects on a subsequently designated critical habitat, repeat the previous finding of jeopardy or no jeopardy here for information purposes.

Destruction or adverse modification:

No critical habitat has been designated for this species; therefore, none will be destroyed or adversely modified.

Critical habitat has been designated for this species, but the action is not likely to affect it: therefore, there is no destruction or adverse modification or the critical habitat.

The action is likely to result in destruction or adverse modification of critical habitat

The action is not likely to result in destruction or adverse modification of critical habitat.

Analyses for jeopardy and adverse modification

Section 7(a)(2) of ESA requires Federal agencies to satisfy two standards in carrying out their programs: Federal agencies must ensure that their activities are not likely to (1) jeopardize the continued existence of any listed species, or (2) result in the destruction or adverse modification of critical habitat. Section 7(a)(4) of ESA also requires Federal agencies to confer with the Services on actions likely to jeopardize the continued existence of any species proposed for listing or result in the destruction of adverse modification of any proposed critical habitat.

Regulations implementing these sections of ESA define "jeopardize the continued existence of" as "to engage in an action that would be expected, directly or indirectly, to reduce appreciably the likelihood of both the survival and recovery of a listed species in the wild by reducing the reproduction, numbers, or distribution of that species", and "destruction or adverse modification" as "a direct or indirect alteration that appreciably diminishes the value of critical habitat for both the survival and recovery of a listed species. Such alterations include, but are not limited to, alterations adversely modifying any of those physical or biological features that were the basis for determining the habitat to be critical."

"Critical Habitat" consists of (1) specific areas within the geographical area currently occupied by a species, at the time it is listed in accordance with ESA, on which are found those physical or biological features (i) essential to the conservation of the species, and (ii) that may require special management considerations or protection, and (2) specific areas outside the geographical area occupied by a species at the time it is listed upon a determination by the Secretary that such areas are essential for the conservation of the species (50 CFR §402.02).

The Services' abilities to designate unoccupied habitat as critical habitat when such areas are essential to the conservation (recovery) of listed species adds another dimension to the analysis. It may be possible to conclude adverse modification for similar actions if unoccupied critical habitat is

sufficiently affected to appreciably diminish its value for both survival and recovery. Therefore, it is practical to distinguish between occupied and unoccupied critical habitat when a biological opinion is prepared.

Analyses are made for jeopardy when the species is present or potentially present, and for adverse modification when designated critical habitat is affected. When both analyses are made and both standards are exceeded, the reasonable and prudent alternatives should address eliminating or reducing both conditions.

The determination of jeopardy or adverse modification is based on the effects of the action on the continued existence of the entire listed species or listed population, and/or the effect on critical habitat as designated in the final rulemaking. When units or groupings of critical habitat are designated for particular purposes, these units or groupings may serve as the basis of the analysis if protection of different facets of the species' life cycle or its distribution is essential to both its survival and recovery. Adverse effects on individuals of a species or constituent elements or segments of critical habitat generally do not result in jeopardy or adverse modification determinations unless that loss, when added to the environmental baseline, is likely to result in significant adverse effects throughout the species' range, or appreciably lower the capacity of the critical habitat to support the species.

Definitions

Appreciably diminish the value: to significantly reduce the capability of critical habitat to satisfy essential both the survival and recovery requirements for a listed species.

Constituent elements - physical and biological features of critical habitat including, but not limited to: (1) space for individual and population growth, and for normal behavior; (2) food, water, air, light, minerals, or other nutritional or physiological requirements; (3) cover or shelter; (4) sites for breeding, reproduction, rearing of offspring, germination, or seed dispersal; and (5) habitats that are protected from disturbance or are representative of the historic geographic and ecological distributions of a species.

Occupied critical habitat: critical habitat that contained individuals of the species when that habitat was designated. A species does not have to occupy critical habitat throughout the year for the habitat to have been considered occupied. Moreover, subsequent events affecting the species may result in this habitat becoming unoccupied.

Recovery: improvement in the status of a species and the ecosystems upon which they depend. Said another way, recovery is the process by which species' ecosytems are restored so they can support self-sustaining and self-regulating populations of listed species as persistent members of native biotic communities.

Survival: the species' persistence, beyond the conditions leading to its endangerment, with sufficient resilience to allow recovery. Said another way, survival is the condition in which a species continues to exist into the future while retaining the potential for recovery. This condition is characterized by a species with a sufficiently large population, represented by all age classes, genetic heterogeneity, and number of sexually mature individuals producing viable offspring, that exists in an environment providing all requirements for completion of the species' entire life cycle, including reproduction, sustenance, and shelter.

Unoccupied critical habitat: critical habitat not occupied by the listed species at the time the critical habitat was designated. The habitat may be suitable, but the species was extirpated from this portion of its range. Conversely, the critical habitat may have been unsuitable for the species when the habitat was designated, but restorable with proper management treatment. Unoccupied habitat is usually designated because it is necessary to either stabilize or assure eventual recovery of a listed species. As recovery proceeds, this formerly unoccupied habitat may become occupied.

Additionally, designated, unoccupied habitat may never be occupied by the species, but is essential for conserving the species because it maintains factors constituting the species' habitat. For example, critical habitat may be designated for an upstream area maintaining the hydrology of the species' habitat downstream from the designated area.

a. Jeopardy analysis

In determining whether an action is likely to jeopardize a species, the action is viewed against the aggregate effects of everything that has led to the species' current status and, for non-Federal activities, those things likely to affect the species in the future. At this point, the biologist sums up the analyses done to determine (1) the status of the species, (2) the environmental baseline, (3) all effects of the proposed action, and (4) the cumulative effects of other anticipated actions.

The final analysis then looks at whether, given the aggregate effects, the species can be expected to survive and recover, as those terms are defined above. For the jeopardy analysis, this survival is framed in terms of the species' reproduction, numbers, and distribution in the wild.

Exceptions to the jeopardy standard: A jeopardy opinion is rendered when the total of the species' status, environmental baseline, effects of the proposed action, and cumulative effects lead to the conclusion that the proposed action is likely to jeopardize the continued existence of the entire species, subspecies, or vertebrate population as listed. However, for many wide-ranging species or those with disjunct or fragmented distributions, strict adherence to this general policy can result in significant accumulated losses of habitat and population that may, in total, result in a jeopardy situation.

In the past, exceptions from the jeopardy standard were granted for specific populations or "recovery units" of a species. That process is discontinued and all exceptions will follow the following guidance.

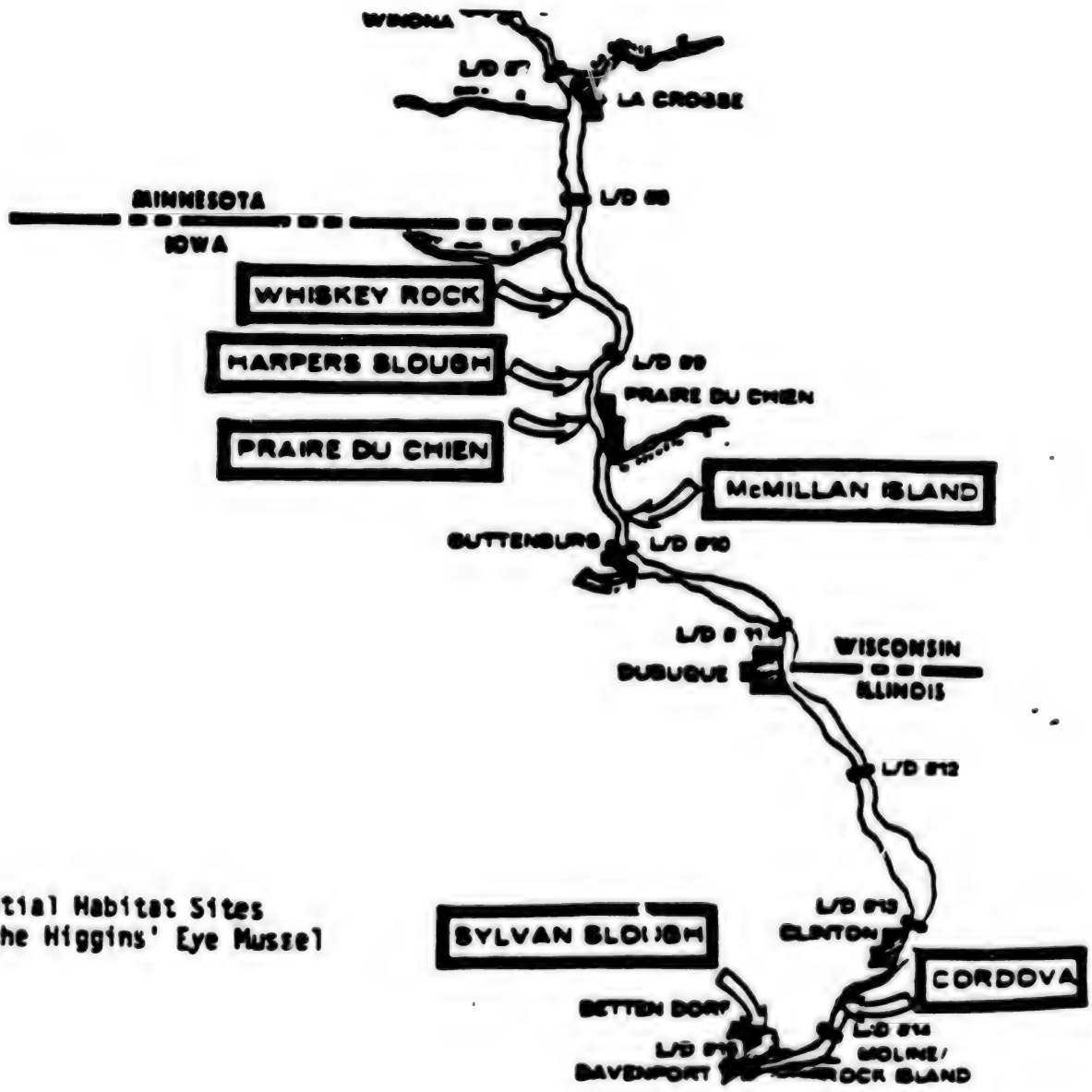
Jeopardy analyses may be based on an assessment of impacts to recovery units when those units are described as necessary to both the survival and recovery of the species in the final listing rule or in the current recovery plan(s) for the species. As most initial recovery plans take 2 1/2 years to complete, any species needing section 7 consideration for less than the entire listed entity should have the appropriate species' subunits described in the final rule.

At publication, a species' recovery plan lays out the best available scientific information relative to the areas and environmental elements needed for that species to recover. Recovery plans may geographically describe actual recovery units (e.g., show lines on a map) essential to recovering the species that may or may not have been designated as critical habitat. Figures 4-8 and 4-9 illustrate such site-specific delineation of recovery units for the Higgin's eye pearly mussel.

When an action appreciably impairs or precludes the capability of a recovery unit from providing both the survival and recovery function assigned it, that action may represent jeopardy to the species. When using this type of analysis, include in the biological opinion a description of how the action affects not only the recovery unit's capability, but the relationship of the recovery unit to both the survival and recovery of the listed species as a whole.

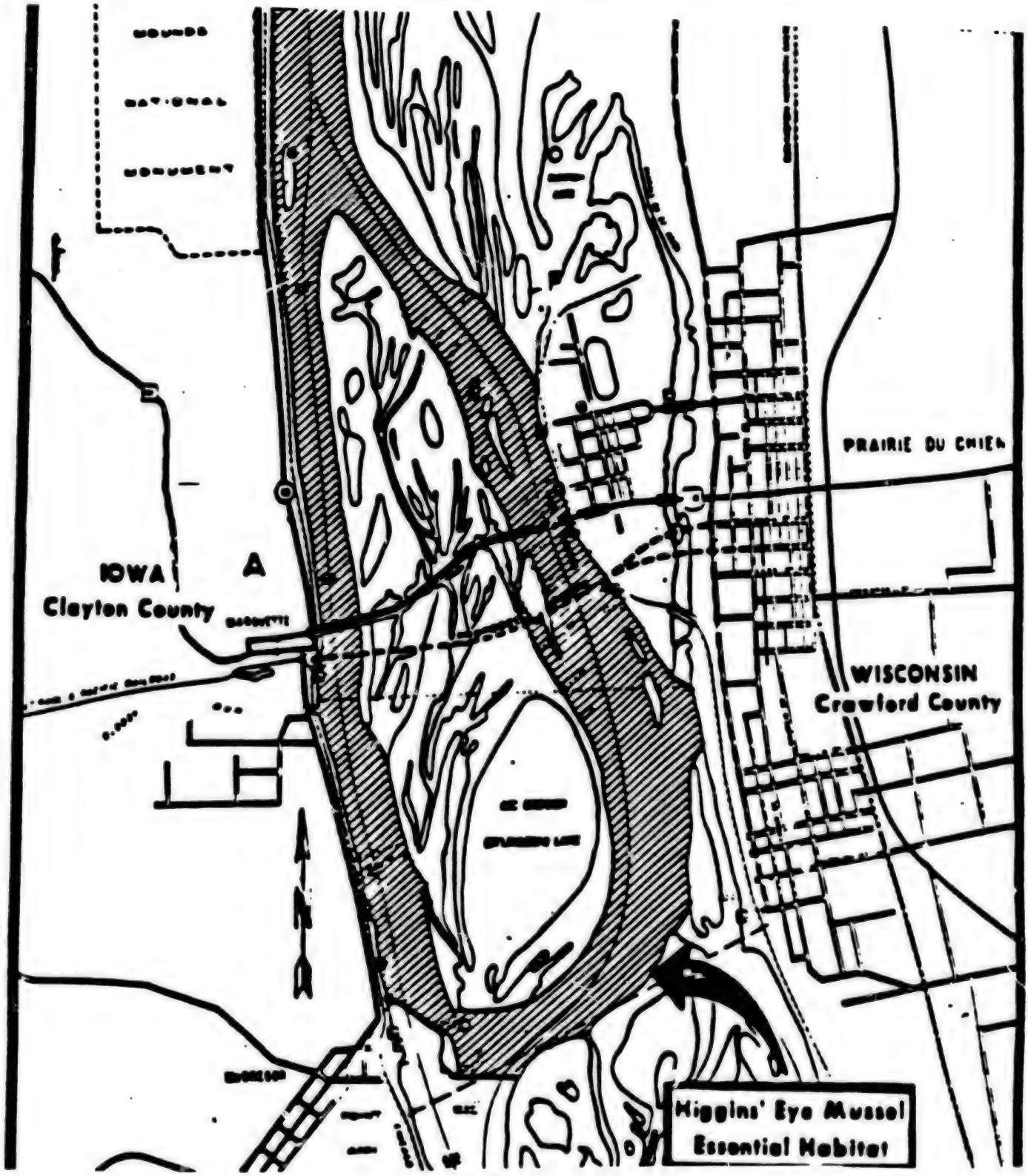
For example, the recovery plan for the Higgin's eye pearly mussel identifies several site-specific units of habitat essential to the recovery of the species. An action that adversely affects the critical features of one of these recovery units can jeopardize the survival and recovery of the species. However, when dealing with a recovery unit keep in mind the status of the species as a whole to ensure that an action affecting only one unit does not jeopardize the whole species. For example, the Prairie du Chien recovery unit of the Higgin's eye pearly mussel, considered alone, might be relatively healthy and appear to be able to sustain some impact before the species in that recovery unit is jeopardized. But, as identified by the approved recovery plan, that recovery unit contains the only known reproducing individuals of the species and may represent a major source of individuals for ensuring the survival of other recovery units, any loss of reproductive capability in the Prairie du Chien unit can represent jeopardy because the conservation of the entire species would be significantly impaired.

Figure 4-8 Example of "recovery unit"



Essential Habitat Sites
for the Higgins' Eye Mussel

Figure 4-9 Example of "recovery unit"



b. Analysis of destruction or adverse modification of critical habitat

Critical habitat includes those physical and biological features essential to the conservation of listed species that may require special management considerations or protection. These physical and biological features include:

- o space for individual and population growth and for normal behavior;
- o food, water, air, light, minerals, or other nutritional or physiological requirements;
- o cover or shelter;
- o sites for breeding, reproduction, rearing of offspring, germination, or seed dispersal;
- o habitats protected from disturbance or representative of the historic geographical and ecological distributions of a species.

When a critical habitat designation is thorough and accurate, that habitat and its constituent elements describe an area that is essential to the ultimate recovery of the listed species. However, many critical habitat designations predate the requirement for identification of constituent elements or habitat qualities necessary to allow a species to survive and recover from extinction. In such cases, the biologist should use the best scientific and commercial data available to determine those characteristics of the designated critical habitat that support the species' survival and recovery.

If an action affects critical habitat, but does not appreciably diminish the value of constituent elements essential to the species' conservation, the adverse modification threshold is not exceeded. On the other hand, the adverse modification threshold is exceeded when the proposed action will adversely affect the critical habitat's constituent elements or their management in a manner likely to appreciably diminish or preclude the role of that habitat in both the survival and recovery of the species. For conference purposes, constituent elements described in the proposal are used to determine likely jeopardy or adverse modification.

The consultation or conference focuses on the entire critical habitat area designated unless the critical habitat rule identifies another basis for analysis, such as discrete units and/or groups of units necessary for different life cycle phases, units representing distinctive habitat characteristics or gene pools, or units fulfilling essential geographic distribution requirements.

To determine if a proposed action is likely to destroy or adversely modify critical habitat, refer to the critical habitat designation in 50 CFR Part 17 Subpart I. The rule provides a narrative description of the area(s) included in the designation. A map of the critical habitat may be provided, and since

1985, the rule may identify constituent elements associated with the habitat.

The level of detail used to describe constituent elements contained in critical habitat designations varies widely. Some, usually older, critical habitat designations do not describe constituent elements, while others provide only a general description of the types of habitat contained within the designation.

For example, the critical habitat designation for the Perdido Key beach mouse (*Peromyscus polionotus trissyllepsis*) identifies the following constituent elements: ..."dunes and interdunal areas, and associated grasses and shrubs that provide food and cover." Similarly, the critical habitat designation for the Sonora chub (*Gila ditaenia*) identifies primary constituent elements as "...clean permanent water with pools and intermediate riffle areas and/or intermittent pools maintained by bedrock or by subsurface flows in areas shaded by canyon walls." As data become available on the species' habitat needs and the qualitative and quantitative attributes of the physical and biological features representing "clean permanent water," it becomes possible to determine if an action is likely to destroy or adversely modify critical habitat.

The following steps help determine if a proposed action is likely to destroy or adversely modify critical habitat:

- Review the status of the critical habitat as designated and the environmental baseline within the action area. The status and environmental baseline for any constituent elements may have been modified by actions considered in earlier biological opinions.

- Those opinions should be consulted to determine the current baseline.

- Evaluate the effects of the proposed action on the constituent elements of critical habitat.

- Evaluate the cumulative effects in the action area on the critical habitat and its constituent elements.

- Assess whether the aggregate effects of these analyses will appreciably diminish the value of the critical habitat in sustaining its role in both the survival and recovery of the species.

Reasonable and prudent alternatives

This section lays out reasonable and prudent alternative actions, if any, the Services believe the agency or the applicant may take to avoid the likelihood of jeopardy to the species or destruction or adverse modification of critical habitat (50 CFR §402.14(h)(3)). When a reasonable and prudent alternative consists of multiple activities, it is imperative that the opinion contain a thorough explanation of how each component of the alternative is essential to avoid jeopardy and/or adverse modification.

If adopted by the action agency, the reasonable and prudent alternatives do not undergo subsequent consultation to meet the requirements of section 7(a)(2). Acceptance of the Services' reasonable and prudent alternative concludes the consultation process.

Section 7 regulations (50 CFR §402.02) limit reasonable and prudent alternatives to:

- alternatives the Services believe will avoid the likelihood of jeopardy,
- alternatives that can be implemented in a manner consistent with the intended purpose of the action,
- alternatives that can be implemented consistent with the scope of the action agency's legal authority and jurisdiction, and
- alternatives that are economically and technologically feasible.

If the Services conclude that certain alternatives are available that would avoid jeopardy and adverse modification, but such alternatives fail to meet one of the other three elements in the definition of "reasonable and prudent alternative," the Services should document the alternative in the biological opinion to show it was considered during the formal consultation process. This information could prove important during any subsequent proceeding before the Endangered Species Committee.

In some cases, no alternatives are available to avoid jeopardy or adverse modification. Examples include cases in which the corrective action relies on:

- an alternative not under consideration (e.g., locating a project in uplands instead of requiring a Corps permit to fill a wetland);
- actions of a third party not involved in the proposed action (e.g., only the County, which is not a party to the consultation, has the authority to regulate speed limits);
- actions on lands over which the action agency has no jurisdiction or no residual authority to enforce compliance; and

- data not available on which to base an alternative.

In these cases, a statement is included that no reasonable and prudent alternatives are available, along with an explanation. When data are not available to support an alternative, the explanation is that according to the best available scientific and commercial data, there are no reasonable and prudent alternatives to the action undergoing consultation.

The Services are committed to working closely with action agencies and applicants in developing reasonable and prudent alternatives. The Services will, in most cases, defer to the action agency's expertise and judgment as to the feasibility of an alternative. When the agency maintains the alternative is not reasonable or not prudent, the reasoning for its position is to be provided in writing for the administrative record. The Services retain the final decision on which reasonable and prudent alternatives are included in the biological opinion. When necessary, the Services may question the agency's view of the scope of its authorities to implement reasonable and prudent alternatives.

The following standardized paragraphs are used in this section:

Introductory paragraph:

> Regulations (50 CFR §402.02) implementing section 7 define reasonable and prudent alternatives as alternative actions, identified during formal consultation, that (1) can be implemented in a manner consistent with the intended purpose of the action, (2) can be implemented consistent with the scope of the action agency's legal authority and jurisdiction, (3) are economically and technologically feasible, and (4) would, the Service believes, avoid the likelihood of jeopardizing the continued existence of listed species or resulting in the destruction or adverse modification of critical habitat.

Closing paragraph:

> Because this biological opinion has found (jeopardy/destruction or adverse modification of critical habitat), the (agency) is required to notify the Service of its final decision on the implementation of the reasonable and prudent alternatives.

B. Incidental Take Statement

> *"(4) If after consultation under subsection (a)(2) of this section, the Secretary concludes that -*
>
> *(A) the agency action will not violate such subsection, or offers reasonable and prudent alternatives which the Secretary believes would not violate such subsection;*
>
> *(B) the taking of an endangered species or a threatened species incidental to the agency action will not violate such subsection; and*
>
> *(C) if an endangered species or a threatened species of a marine mammal is involved, the taking is authorized pursuant to section 1371(a)(5) of this title;*
>
> *the Secretary shall provide the Federal agency and the applicant concerned, if any, with a written statement that -*
>
> *(i) specifies the impact of such incidental taking on the species,*
>
> *(ii) specifies those reasonable and prudent measures that the Secretary considers necessary or appropriate to minimize such impact,*
>
> *(iii) in the case of marine mammals, specifies those measures that are necessary to comply with section 1371(a)(5) of this title with regard to such taking, and*
>
> *(iv) sets forth the terms and conditions (including, but not limited to, reporting requirements) that must be complied with by the Federal agency or applicant (if any), or both, to implement the measures specified under clauses (ii) and (iii)."*
>
> Section 7(b)(4) of the Endangered Species Act

As a matter of policy, the Services require an incidental take statement be included in all formal consultations, thus assuring the action agency that this element of formal consultation has been considered.

What is incidental take

Properly interpreting an incidental take statement requires familiarity with section 9 of ESA, which identifies acts that are prohibited when dealing with any endangered and some threatened[1] species of fish and wildlife. When the consultation involves plants, the agency is advised that ESA does not address incidental take of these species. However, cautions may be provided on prohibitions against certain deliberate takings of plants (see standardized statement on page 4-45). The term "take" is defined by ESA (section 3(19)) to mean *"to harass, harm, pursue, hunt, shoot, wound, kill, trap, capture, or collect, or to attempt to engage in any such conduct."*

---

[1] Section 9 prohibitions apply to threatened species unless there are special rules that provide exemptions. To determine if section 9 prohibitions apply to threatened species, check 50 CFR Part 17 for any special rules that may have been promulgated for the species.

Most of these terms are commonly understood. However, the terms "harm" and "harass" have been further defined by regulations at 50 CFR §17.3, as follows:

- Harass means an intentional or negligent act or omission which creates the likelihood of injury to wildlife by annoying it to such an extent as to significantly disrupt normal behavior patterns which include, but are not limited to, breeding, feeding, or sheltering.

- Harm means an act which actually kills or injures wildlife. Such acts may include significant habitat modification or degradation when it actually kills or injures wildlife by significantly impairing essential behavioral patterns including breeding, feeding or sheltering.

A 1981 Solicitor's opinion (Appendix D, #SO-1) expands on these concepts, holding that an act that harasses wildlife must demonstrate the likelihood of injury to the species and some degree of fault, whether intentional or negligent. Thus, a private landowner who wishes to develop land that serves as habitat for listed wildlife is not harassing that wildlife if reasonable measures are taken to avoid their injury. However, if the modification of such habitat actually results in death or injury, the species would be "harmed."

Identifying habitat modifications that harm individuals of a species involves understanding the species' life history. For example, the Florida scrub jay is highly territorial and relies for its existence on food cached within its territory. A project that destroys occupied habitat and thus the food supply for that family group is likely to result in their starvation. Similarly, a number of birds are highly site-tenacious, returning year after year to the same nesting site. Removal of nesting habitat on that site is likely to result in loss of the pair's reproductive capability, and may result in loss of the pair for lack of available feeding or nesting habitat. Opening up or fragmenting the habitat may similarly affect the species by introducing increased predation or parasitism.

Incidental take statements exempt action agencies and their permittees from ESA's section 9 prohibitions if they comply with the reasonable and prudent measures and the terms and conditions of incidental take statements.

> ***"(o) EXEMPTION AS PROVIDING EXCEPTION ON TAKING OF ENDANGERED SPECIES - ". . . (2) any taking that is in compliance with the terms and conditions specified in a written statement provided under subsection (b)(4)(iv) of this section shall not be considered to be a prohibited taking of the species concerned."***
>
> Section 7(o)(2) of the Endangered Species Act

In order to be considered in an incidental take statement, any taking associated with an agency's action must meet three criteria:

- it must not be likely to jeopardize the continued existence of listed species or destroy or adversely modify critical habitat,
- it must result from an otherwise lawful activity, and
- it must be incidental to the purpose of the action.

An agency action can meet the first criterion if (1) reasonable and prudent alternatives identified in a jeopardy or adverse modification biological opinion eliminate the likelihood of jeopardy or adverse modification of critical habitat or (2) the Services make a finding of no jeopardy or no adverse modification. When the taking associated with the action violates any of these criteria, the Services provide a documentation of that fact and a statement that such taking is prohibited by section 9.

In issuing an incidental take statement, the Services provide a statement of anticipated incidental take with reasonable and prudent measures, as appropriate, to minimize such take. This statement provides an exemption from the taking prohibitions of section 9 only when the agency and/or applicant demonstrate clear compliance with the implementing terms and conditions. These terms and conditions and the reporting requirements in the incidental take statement are binding on the action agency. When an action agency declines to take the reasonable and prudent measures and their implementing terms and conditions or conditions of the license or permit, the incidental take statement documents this fact(s) and includes a statement that under this consultation any anticipated taking is prohibited by section 9, and the applicant must be advised to apply for a permit under section 10(a)(1)(B).

In preparing an incidental take statement, the Services are responsible for documenting the amount or extent of take anticipated; writing reasonable and prudent measures with implementing terms and conditions that are clear, precise, and enforceable; and including reporting requirements that assure timely compliance with the terms and conditions described.

Standardized statements are provided for each section of the incidental take statement. For standardized statements for intra-Service consultations on section 10(a)(1)(B) permits, see page 4-50; involving migratory birds or marine mammals, pages 4-51,52; and for pesticide consultations, page 4-65.

The following standardized paragraphs are used in incidental take statements:

Introductory paragraph:

> Sections 4(d) and 9 of ESA, as amended, prohibit taking (harass, harm, pursue, hunt, shoot, wound, kill, trap, capture or collect, or attempt to engage in any such conduct) of listed species of fish or wildlife without a special exemption. Harm is further defined to include significant habitat modification or degradation that results in death or injury to listed species by significantly impairing behavioral patterns such as breeding, feeding, or sheltering. Harass is defined as actions that create the likelihood of injury to listed species to such an extent as to significantly disrupt normal behavior patterns which include, but are not limited to, breeding, feeding or sheltering. Incidental take is any take of listed animal species that results from, but is not the purpose of, carrying out an otherwise lawful activity conducted by the Federal agency or the applicant. Under the terms of section 7(b)(4) and section 7(o)(2), taking that is incidental to and not intended as part of the agency action is not considered a prohibited taking provided that such taking is in compliance with the terms and conditions of this incidental take statement.
>
> The measures described below are non-discretionary, and must be implemented by the agency so that they become binding conditions of any grant or permit issued to the applicant, as appropriate, in order for the exemption in section 7(o)(2) to apply. The (agency) has a continuing duty to regulate the activity covered by this incidental take statement. If the (agency) (1) fails to require the applicant to adhere to the terms and conditions of the incidental take statement through enforceable terms that are added to the permit or grant document, and/or (2) fails to retain oversight to ensure compliance with these terms and conditions, the protective coverage of section 7(o)(2) may lapse.

When the biological opinion finds jeopardy or adverse modification without a reasonable and prudent alternative, the introductory statement is as follows:

> As the biological opinion finds the proposed action will result in [likely jeopardy to the species/destruction or adverse modification of critical habitat], and no reasonable and prudent alternative can be identified, any incidental taking is prohibited by section 9 of ESA.

Special provisions for plants, as appropriate, follow:

> Sections 7(b)(4) and 7(o)(2) of ESA do not apply to the incidental take of listed plant species. However, protection of listed plants is provided to the extent that ESA requires a Federal permit for removal or reduction to possession of endangered plants from areas under Federal jurisdiction, or for any act that would remove, cut, dig up, or damage or destroy any such species on any other area in knowing violation of any regulation of any State or in the course of any violation of a State criminal trespass law. [Include citations to appropriate State laws if helpful.]

Amount or extent of incidental take

This section outlines the amount of take anticipated from the action. Generally, incidental take is expressed as the number of individuals likely to be taken or the extent of habitat likely to be destroyed or disturbed. When preparing an incidental take statement, a specific number (for some species, expressed as an amount or extent, e.g., all turtle nests not found and moved by the approved relocation technique), or level of disturbance to habitat must be described. Take can be expressed also as a change in habitat characteristics affecting the species (e.g., for an aquatic species, changes in water temperature or chemistry, flows, or sediment loads).

In some situations, the species itself or the effect on the species may be difficult to detect. However, some detectable measure of effect should be provided. For instance, the relative occurrence of the species in the local community may be sufficiently predictable that impacts on the community (usually surrogate species in the community) serve as a measure of take, e.g., impacts to listed mussels may be measured by an index or other sensusing technique that is based on surveys of non-listed mussels. In this case, the reinitiation level describes factors for the non-listed mussels indicating impact on the listed species, such as an amount or extent of decrease in numbers or recruitment, or in community dynamics. Similarly, if sufficiant causal link is demonstrated, the number of burrows affected or a quantitative loss of cover, food, water quality, or symbionts can establish a measure of the impact on the species or its habitat and provide the yardstick for reinitiation.

Also, the time period over which the incidental take is expected to occur is addressed in this section. For example, the statement should distinguish between an instance in which a permanent loss of two bald eagle nesting territories will result from construction of a new bridge, and a case in which the two territories are likely to be abandoned only during the actual construction period.

Standardized statements:

- Incidental take statement when no take is anticipated:

> The Service does not anticipate the proposed action will incidentally take any (species).

- Incidental take statement for a biological opinion of likely jeopardy when incidental take is anticipated:

o For opinions with only one reasonable and prudent alternative:

> The Service has developed the following incidental take statement based on the premise that the reasonable and prudent alternative will be implemented.

o For opinions with more than one reasonable and prudent alternative, provide separate estimates of anticipated take for each reasonable and prudent alternative, as appropriate:

> The Service has developed the following incidental take statement based on the premise that reasonable and prudent alternative number XX will be implemented.

- Introductory statement for amount and extent of take:

> The Service anticipates (number of individuals or extent of habitat resulting from take of (species)) could be taken as a result of this proposed action. The incidental take is expected to be in the form of (harm, harass, kill, etc.). [Separately specify each type of take anticipated.]
>
> [Provide a concise summary of the analysis leading to this determination.]
>
> OR
>
> The Service anticipates incidental take of (species) will be difficult to detect for the following reason(s): [Incidental take of actual species numbers may be difficult to detect when the species is wide-ranging; has small body size; finding a dead or impaired specimen is unlikely; losses may be masked by seasonal fluctuations in numbers or other causes (e.g., oxygen depletions for aquatic species); or the species occurs in habitat (e.g., caves) that makes detection difficult]. However, the following level of take of this species can be anticipated by loss [quantify] of [surrogate species, food, cover, other essential habitat element such as water quantity or quality, or symbiont] because: [provide an explanation].

Effect of the take

The requirement that incidental take not reach the level of jeopardy or adverse modification is addressed in the biological opinion that finds no jeopardy/no adverse modification for the action or that provides reasonable and prudent alternative(s) to avoid jeopardy/adverse modification.

Statement of impact:

o The following statement should be made when the biological opinion finds likely jeopardy/adverse modification, and no reasonable and prudent alternative is available.

> Because the proposed action is likely to jeopardize the continued existence of [species] or result in the destruction or adverse modification of critical habitat, and because no reasonable and prudent alternatives have been identified, no authorization of incidental take can be provided.

- o The opinion is not likely to result in jeopardy/adverse modification:

  In the accompanying biological opinion, the Service determined that this level of anticipated take is not likely to result in jeopardy to the species or destruction or adverse modification of critical habitat.

- o The opinion contains reasonable and prudent alternatives:

  In the accompanying biological opinion, the Service determined that this level of anticipated take is not likely to result in jeopardy to the species or destruction or adverse modification of critical habitat when [one of] the reasonable and prudent alternative[s] is implemented.

Reasonable and prudent measures, and terms and conditions

A reasonable and prudent measure describes actions to minimize incidental take, e.g., a measure may call for actions like education of employees about the species, reduction of predation, removal or avoidance of the species, or monitoring. The terms and conditions set out the specific methods by which these objectives are to be accomplished, e.g., who is to be educated, when/what/how; the actions necessary to reduce predation; who may remove or how to avoid the species; or the protocol for monitoring. These detailed terms and conditions require compliance.

Reasonable and prudent measures

The incidental take statement provides necessary or appropriate measures to minimize take. These measures should decrease the level of take to the extent reasonable and prudent. Measures are considered reasonable and prudent when they are consistent with the proposed action's basic design (e.g., narrowing of disturbed right-of-way at known species locations), location (e.g., temporary storage of equipment or other materials), scope, duration, and timing. The test for reasonableness is whether the proposed measure would cause more than a minor change to the project.

For example, the effect of measures costing $10,000 or $100,000 may be significant for a single family boat dock, but minor for a multi-million dollar development complex. An example of an unreasonable measure would be a timing delay to minimize adverse effects if project timing is critical.

Reasonable and prudent measures are to minimize adverse effects on the specific individuals or habitat affected by the action. Activities resulting from these measures must occur within the action area, which may be larger than the footprint of the project itself (see description of action area on pages 4-14 to 4-18) .

Reasonable and prudent measures are not a substitute for a finding of jeopardy

or adverse modification. Similarly, discretionary conservation recommendations under section 7(a)(1) are not a substitute for reasonable and prudent measures as a means of minimizing the impacts of incidental take.

Standardized introductory paragraph for reasonable and prudent measures for species other than marine mammals and migratory birds:

> The Service believes the following reasonable and prudent measure(s) are necessary and appropriate to minimize take of (species): [Go on to list these measures and provide a brief discussion documenting the Services' analysis of the biological need for, and reasonableness of, these measures.]

Terms and conditions

Terms and conditions of an incidental take statement include reporting and monitoring requirements that assure adequate action agency oversight of any incidental take. The monitoring must be sufficient to determine if the amount or extent of take is approached or exceeded, and the reporting must assure that the Services will know when that happens.

The "disposition of individuals taken" portion of the incidental take statement distinguishes between injured and killed animals, and tells the action agency (1) what needs to be done with sick or injured animals to assure adequate care; (2) how to preserve dead animals to determine the cause of death, if not known; (3) the procedures for disposing of the animal, including shipping preserved animals to research facilities; and (4) to notify the nearest Service Law Enforcement Office when a listed species is taken.

Care should be exercised in developing the incidental take statement and its terms and conditions. Consider: (1) any incidental take anticipated must not be likely to result in jeopardy; (2) the action agency must provide for monitoring the actual number of individuals taken; (3) review requirements should determine when the reasonable and prudent measures are not reducing the effect to the extent anticipated; and (4) the action agency must immediately reinitiate formal consultation if the anticipated level of incidental take is exceeded, and stop the activity causing the take during reinitiation.

Standardized introductory paragraph for terms and conditions:

> In order to be exempt from the prohibitions of section 9 of ESA, the (agency) must comply with the following terms and conditions, which implement the reasonable and prudent measures described above. These terms and conditions are non-discretionary.
>
> [Go on to list these terms and conditions, including the requirements for monitoring, reporting, review, and disposition of any specimens.]

Salvage of species and habitat data included as a term and condition: Where

practical, an attempt should be made to salvage specimens or habitat data from areas to be destroyed as a direct or indirect result of the action. For example, when the Services determine that research would be beneficial to the species (generally identified by a recovery plan or recovery outline), and a willing researcher has a permit for that research, the terms and conditions could call for reasonable allowance to collect biological data on specimens that would be killed, or information on species' habitat (e.g., the construction, depth, moisture characteristics of underground burrows). "Reasonable" is to be defined in each case as appropriate to the action, and should not significantly delay legitimate project activities. For example, if the action is time sensitive, such as bulldozing a firebreak during a fire, there may be insufficient time to collect specimens. However, should a long-term project be proposed, such as development of a housing project, more extensive opportunities for collection may exist.

Salvaging live specimens may minimize the net adverse effects of an action by providing individuals for captive breeding or approved translocation. If dead specimens can be collected, valuable data may still be obtained, possibly providing research material in lieu of the need to collect additional specimens.

Terms and conditions for salvage efforts are explicitly described in the incidental take statement to fully inform the action agency and/or the applicant of how they are to comply with that statement. Information is to be provided as to who will do the salvage, where, when, techniques to be employed, the fate of specimens and data collected, the possible need for Federal and/or State permits or other documentation to conduct or transfer the specimens, or guidelines on who to contact for changes in the protocol.

Review requirement included as a term and condition: The anticipated level of incidental take is to be minimized by the reasonable and prudent measures and implementing terms and conditions. Thus, a new lowered level of incidental take is anticipated with these measures in place. To ensure that the measures are working as anticipated, a review requirement is included as follows:

> The reasonable and prudent measures, with their implementing terms and conditions, are designed to minimize incidental take that might otherwise result from the proposed action. With implementation of these measures the Service believes that no more than (number or extent) will be incidentally taken. If, during the course of the action, this minimized level of incidental take is exceeded, such incidental take represents new information requiring review of the reasonable and prudent measures provided. The Federal agency must immediately provide an explanation of the causes of the taking and review with the Service the need for possible modification of the reasonable and prudent measures.

Coordination with section 10 permits

Section 10(a)(1)(A) permits

Determining whether a section 10(a)(1)(A) permit is needed in addition to the incidental take statement rests on the nature of the proposed action. When deliberate take is described as part of the proposal in order to minimize anticipated incidental take, the section 7 serves as the authority for that take. For example, an agency dealing repeatedly with actions affecting desert tortoise may make the standard conditions of previous consultations part of the proposal. This action would not require a separate section 10 permit.

However, when deliberate take for conservation purposes is part of the overall action being reviewed, a permit application should be processed simultaneously. For example, a hypothetical forest management plan outlines all of the potential classes of activities to be carried out on that forest. The biological opinion and incidental take statement cover the effects of timber harvest, recreational activities, etc. When that portion of the plan covering the management of listed and proposed species involves deliberate (and accompanying incidental) take to facilitate that management, a separate section 10 permit is required. Coordinating these two activities will enable the Services to provide all required ESA documents at one time.

Section 10 permits are not required:

- for activities carried out under an approved cooperative section 6 agreement as long as any taking is not reasonably anticipated to result in (1) the death or permanent disabling of the specimen; (2) the removal of the specimen from the State where the taking occurred; (3) the introduction of the specimen so taken, or any progeny derived from such specimen, into an area beyond the historical range of the species; or (4) the holding of the specimen in captivity for a period of more than 45 consecutive days. (50 CFR §17.21(c)(5))

- for take activities directed by the terms and conditions of an incidental take statement in accordance with section 7(o)(2).

When incidental take involves an applicant or licensee, the permitting Federal agency should be directed to provide a copy of the incidental take statement to the applicant/licensee, or to include the language of the terms and conditions in the permit itself. The applicant/licensee then has a document in their possession at anytime they are involved in an action that may result in take.

Terms and conditions covering research or other "enhancement" activities detail the conditions of the research or require a subsequent Service and/or State review and approval of the research plan. See chapter VI.E. of the Handbook for Endangered and Threatened Species Permits for conditions included in section 10 permits.

Section 10(a)(1)(B) permits

Permits for incidental take under section 10(a)(1)(B) require an intra-Service consultation, conducted in the same manner as outlined in this chapter except the incidental take statement is governed by section 10(a)(1)(B) to the extent that mitigation, including off-site compensation not directed at the affected individuals, may be considered.

The incidental take statement summarizes and references the terms of the habitat conservation plan and includes the following standardized language. Add the verbiage in parentheses when an implementing agreement is required to ensure the terms of the habitat conservation plan are carried out. Appropriate changes may be made in the wording of the following paragraphs when consulting on any subsequent amendments to the permit.

(a) Reasonable and prudent measures

> Any incidental take of (species) must comply with all the terms and conditions of the section 10(a)(1)(B) permit (including the provisions of the Implementing Agreement).

(b) Terms and conditions

> A section 10(a)(1)(B) permit, as evaluated in this biological opinion, must be issued by the Fish and Wildlife Service.
>
> (The Implementing Agreement for the Habitat Conservation Plan for the section 10(a)(1)(B) permit must be agreed to by the Fish and Wildlife Service.)

Coordination with other wildlife laws

Migratory birds

When dealing with listed migratory birds, the incidental take statement alerts the action agency that the incidental take statement provided under the Endangered Species Act does not cover the agency's or applicant's potential liabilities for take under the more restrictive provisions of the Migratory Bird Treaty Act. When the terms and conditions are appropriately implemented, the incidental take statement provided under the Endangered Species Act represents only an exemption from the taking provision of section 9. The statement does not absolve the agency or applicant from liability for penalties under the MBTA. The Office of Migratory Bird Management is considering a regulatory program addressing incidental take of listed migratory birds, other than bald eagles. However, until that program is in place, the following standardized statement is included in incidental take statements involving listed migratory birds.

Standard paragraph for listed migratory birds:

Notice: While the incidental take statement provided in this consultation satisfies the requirements of the Endangered Species Act, as amended, it does not constitute an exemption from the prohibitions of take of listed migratory birds under the more restrictive provisions of the Migratory Bird Treaty Act.

The Bald and Golden Eagle Protection Act does not contain provision for incidental take of bald eagles, their eggs or nests. Thus the Services will not authorize incidental take of bald eagles under ESA. If incidental take of bald eagles is anticipated, document that take, but add the following statement in the Amount or extent of incidental take section: [Note: This statement ends discussion of bald eagles in the incidental take statement. In this particular instance, any appropriate actions to minimize incidental take may be addressed in the conservation recommendations section.]

The incidental take of bald eagles is not authorized by the Bald and Golden Eagle Protection Act. Therefore, such take is not authorized by this incidental take statement.

Marine mammals

The Endangered Species Act alone does not provide authority for the incidental take of listed marine mammals. Listed, Service-administered marine mammals currently include the southern sea otter and manatee (the dugong, in U.S. waters, was proposed in 8/93). Incidental take of such species must conform with the requirements of both the Endangered Species Act and the Marine Mammal Protection Act before such take is authorized. Framework regulations at 50 CFR §18.27 and Part 228 establish standards and a process for determining whether an exception exists for incidental taking of small numbers of marine mammals related to a specific activity in a specific geographic region. After a set of area-specific regulations are promulgated for a particular area or activity, letters of authorization are issued annually by the NMFS or the FWS, depending on the species involved, to each person wishing to conduct an activity that may result in incidental take. Consistent with the Endangered Species Act and regulations at 50 CFR §402.14(i) (Appendix A), incidental take statements for marine mammals are not included in formal consultations until area specific regulations are in effect.

The Marine Mammal Protection Act Amendments of 1994 authorize incidental take of marine mammals in the form of "harassment" for non-commercial fishing activities, and permits for death/injury incidental take for commercial fishing activities under certain circumstances. Regulations implementing these amendments are anticipated early in 1995. Further guidance on standardized statements for these activities will be provided at that time.

Standard paragraph for incidental take of marine mammals: [Before area- or activity-specific regulations are promulgated:]

The Service is not including an incidental take authorization for marine

mammals at this time because the regulations required for incidental take of marine mammals in this specific area or for this activity have not been issued under section 101(a)(5) of the Marine Mammal Protection Act and/or its 1994 Amendments. Following issuance of such regulations, the Service may amend this biological opinion to include an incidental take statement for marine mammals, as appropriate.

After area-specific or activity-specific regulations have taken effect:

Pursuant to section 101(a)(5) of the Marine Mammal Protection Act, as amended in 1994, and implementing regulations at 50 CFR §18.27, the following measures are required to be consistent with the total taking allowable under the area/activity specific regulations at 50 CFR §18.27(_) [insert appropriate citation] and to effect the least practical adverse impact on the species and its habitat and on the availability of the species for subsistence uses: [Cite measures identified in specific regulations and/or letters of authorization or permits for commercial fishing]. Pursuant to section 7(b)(4) of the Endangered Species Act, the following reasonable and prudent measures are necessary and appropriate to minimize take: [Go on to list the measures, followed by the standard paragraph for terms and conditions.]

C. Conference Report/Notice

The Services are the Federal agency responsible for determining whether an action is likely to jeopardize listed species or destroy or adversely modify designated critical habitat. The Services also may assist action agencies in making such a preliminary determination for proposed species or proposed critical habitats, but remains responsible for the final determination of likely jeopardy or adverse modification to such proposed species or critical habitats. When the Services preliminarily determine a proposed agency action presents the likelihood of jeopardy to proposed species or adverse modification to proposed critical habitat, the action agency should be advised in writing.

When the proposed action is under consultation, notice of the need to confer (or, if the action agency requests an informal conference, the conference report) is included in the consultation package following the incidental take statement. A finding of "likely to jeopardize" is not required to trigger the conference procedure if the action agency wishes to initiate a review of possible effects on a proposed species or critical habitat. The Services will confer when an agency requests such a conference based on their determination that the proposed action may affect a proposed species or critical habitat.

When an action agency requests formal conference for an action that also affects listed species, the analyses of effects may be included in the body of the biological opinion. However, an incidental take statement for proposed species is separated from that for listed species, and contains the standardized language provided in chapter 5.

D. Conservation Recommendations

> *"(1) The Secretary shall review other programs administered by him and utilize such programs in furtherance of the purposes of this Act. All other Federal agencies shall, in consultation with and with the assistance of the Secretary, utilize their authorities in furtherance of the purposes of this Act by carrying out programs for the conservation of endangered species and threatened species. . . ."*
>
> Section 7(a)(1) of the Endangered Species Act

When the Services identify discretionary actions the agency can implement, relevant to the proposed action and consistent with their section 7(a)(1) authority, voluntary conservation recommendations may be included as a separate item in the consultation package. Conservation recommendations serve several purposes. They can suggest how an action agency can assist species conservation in furtherance of their responsibilities under section 7(a)(1) of ESA. They may further minimize or avoid the adverse effects of a proposed action on listed species or critical habitat; in which case they are applied after the terms and conditions of the incidental take statement are implemented. They can recommend studies improving an understanding of a species' biology or ecology. Wherever possible, these actions should be tied to tasks identified in recovery plans.

Conservation recommendations may be provided separately or at the end of the consultation package, but they are not incorporated anywhere in the biological opinion or incidental take statement where they may be confused with the opinion or statement itself. These recommendations are <u>never</u> a precondition for a subsequent finding of no jeopardy or to reduce anticipated incidental take.

Standardized paragraphs for conservation recommendations:

Introductory paragraph:

> Section 7(a)(1) of ESA directs Federal agencies to utilize their authorities to further the purposes of ESA by carrying out conservation programs for the benefit of endangered and threatened species. Conservation recommendations are discretionary agency activities to minimize or avoid adverse effects of a proposed action on listed species or critical habitat, to help implement recovery plans, or to develop information.

Closing paragraph:

> In order for the Service to be kept informed of actions minimizing or avoiding adverse effects or benefitting listed species or their habitats, the Service requests notification of the implementation of any conservation recommendations.

E. Reinitiation Notice

Section 7 regulations outline four general conditions for reinitiating formal consultation: (a) if new information reveals effects of the action that may affect listed species or critical habitat in a manner or to an extent not previously considered, (b) the action is modified in a manner causing adverse effects to listed species or critical habitat not previously considered, (c) a new species is listed or critical habitat designated that may be affected by the action, or (d) the amount or extent of incidental take is exceeded.

In this section, the Services should identify situations, if any, that meet one or all of these four conditions. For example, the Services may identify studies in progress whose results may cause a reassessment of the biological opinion, or proposed listings or critical habitat designations.

The standard closing statement of the formal consultation package is as follows:

> This concludes formal consultation on the action(s) outlined in the (request/reinitiation request). As provided in 50 CFR §402.16, reinitiation of formal consultation is required where discretionary Federal agency involvement or control over the action has been retained (or is authorized by law) and if: (1) the amount or extent of incidental take is exceeded; (2) new information reveals effects of the agency action that may affect listed species or critical habitat in a manner or to an extent not considered in this opinion; (3) the agency action is subsequently modified in a manner that causes an effect to the listed species or critical habitat not considered in this opinion; or (4) a new species is listed or critical habitat designated that may be affected by the action. In instances where the amount or extent of incidental take is exceeded, any operations causing such take must cease pending reinitiation.

F. Literature Cited

Section 7(a)(2) of ESA requires biological opinions to be based on "the best scientific and commercial data available." This section identifies the scientific and commercial data used in developing the biological opinion.

4.6 PROCEDURES FOR MODIFYING BIOLOGICAL OPINIONS AND INCIDENTAL TAKE STATEMENTS

When the action agency determines (1) the amount or extent of incidental take has been exceeded, (2) new information reveals effects of the action that may affect listed species or critical habitat in a manner or to an extent not considered in the original consultation, (3) the action is modified in a manner causing an effect on listed species or critical habitat not considered in that consultation, or (4) the action may affect a new listed species or new designated critical habitat, consultation must be reinitiated. Similarly, if the Services recognize any of these conditions has occurred, written advice is provided to the action agency of the need to reinitiate consultation.

Documentation of a reinitiated consultation must be in writing, and contains sufficient information to record the nature of the change in the action's effects and the rationale for amending analyses of anticipated incidental take or the reasonable and prudent alternatives or measures (Exhibit 4-4). Reinitiations involving major changes in effects analyses or changes in the Services' biological opinion are addressed fully in a new consultation.

A reinitiation based on a new species listing or critical habitat designation is treated as a new consultation, although data in the original opinion may be referenced when the action has not changed.

Exhibit 4-4 Example of modification of an incidental take statement

United States Department of the Interior

FISH AND WILDLIFE SERVICE

FISH AND WILDLIFE ENHANCEMENT
RENO FIELD STATION
4600 Kietzke Lane, Building C-125
Reno, Nevada 89502-5093

February 7, 1991
File No.: 1-5-90-F-25

Memorandum

To: District Manager, Las Vegas District, U. S. Bureau of Land Management, Las Vegas, Nevada

From: Field Supervisor, Reno Field Station, U. S. Fish and Wildlife Service, Reno, Nevada

Subject: Clark County Regional Flood Control District's Proposed 10-Year Plan for Flood Control Facilities: Amendment to Opinion

This letter constitutes an amendment to the August 29, 1990, Biological Opinion on the Clark County Regional Flood Control District's (District) 10-Year Plan (File No.: 1-5-90-F-25). The Fish and Wildlife Service (Service) has received verbal communication from [redacted] of the Bureau of Land Management's Las Vegas District office on January 10, 1991, and copies of correspondence to your agency from the District dated November 26, 1990, and January 3, 1991, regarding changes in the design of the Upper Las Vegas Wash Detention Basin (Facility NJ-8). In addition, that portion of the floodway (NJ-1) extending north of the detention basin is proposed to be eliminated. Ms. Cole requested our determination of whether additional surveys would be required, and whether formal consultation with the Service should be reinitiated.

Our review of the alternative proposal indicates that the overall size of the new detention basin will be 5 acres less than that of the original facility. Furthermore, the area to be disturbed by the new proposed dike, located in the same general area as the floodway, is less than that of the portion of the floodway that will be eliminated by the alternative design. Therefore it is likely that the level of incidental take that would occur from construction of NJ-8 Alt. would not exceed that which would occur from the original proposal.

Accordingly, the following condition is substituted for Condition 1.e. of the Biological Opinion issued to your agency on August 29, 1990. The change from the original condition is underlined.

> 1.e. Temporary tortoise proof fencing shall be erected around each of the following facilities prior to beginning construction activities: NJ-8 Alt.; N4-8; N5-1, 2, 3, 4, 5, 6; N10-9, 10, 11; N12-9, 10, 11; C1-45; C2-46, 47, 48, 49, 52, 53; S1-59; S2-81; S4-23, 24; S20-17; S21-28, 29; S22-25; 4109-28. A qualified biologist shall supervise the

exection of the fence. All tortoise burrows and other burrows and dens that could be occupied by tortoises within the fence construction zone shall be excavated by hand. All tortoises, including any eggs found, shall be removed from the fence construction zone according to the protocol provided in Appendix C prior to brush removal, grading, and fence installation.

If you have any questions, please contact [redacted] at (702) 784-7227 or FTS 470-5227.

4.7 SPECIAL CONSULTATIONS AND REVIEWS

The following procedures facilitate section 7 compliance for complex programs or specialized situations.

(A) Conservation Reviews - Section 7(a)(1)

> ***The Secretary shall review other programs administered by him and utilize such programs in furtherance of the purposes of this Act. All other Federal agencies shall, in consultation with and with the assistance of the Secretary, utilize their authorities in furtherance of the purposes of this Act by carrying out programs for the conservation of endangered species and threatened species listed pursuant to section 4 of this Act.***
>
> Section 7(a)(1) of the Endangered Species Act

Comprehensive guidance on implementation of section 7(a)(1) is under development, and needs to be closely coordinated with the section 7(a)(2) consultation program. Service offices and other agencies have recognized the need for and have requested section 7 reviews of major national programs, such as the Division of Refuges review of their Refuges 2003 plan for administration of the National Wildlife Refuge System.

Refuges 2003 outlines the management concepts that will govern how National Wildlife Refuges are managed. In these situations, a traditional section 7(a)(2) review of effects of the action(s) on listed species would be difficult, as the magnitude of scope and possible permutations of activity/species interface cannot be anticipated fully at this time without establishing appropriate parameters for such impact analyses. What is possible is an overview of potential effects (e.g., effects of types of activities on groups of listed species), allowing the Services and agency to establish protocols for determining when section 7(a)(2) consultations are appropriate. [Note: Whenever possible, the Services prefer to consult on the stepped-down management programs where more specific effects on species, within their range, ecosystem, ecoregion, or other logical comprehensive unit of measure, can be determined.]

These conservation reviews should ultimately provide the agency with concurrence on or recommendations for a blueprint for conservation activities including section 7(a)(2) consultation, section 10 permits, assistance in developing and implementing recovery plans, and assistance in candidate monitoring and management programs. Initial efforts will address the consultation component, and examples will be provided as they become available. For the time being, such conservation reviews are confined to national programs (plans, regulations) and will be conducted or coordinated by the Washington Office.

(B) National Consultations - Section 7(a)(2)

Increasingly, the Services are requested to consult on an action or series of actions affecting many species over all or a major portion of the country. Examples have included: the Animal and Plant Health Inspection Service's (APHIS) Animal Damage Control program addressing most of that office's activities nationwide; and the Environmental Protection Agency's (EPA) pesticide registration program (below). These consultations are addressed by one or more teams from the Regions, with the lead assigned to one Region or the Washington Office. National consultations will be signed in the Washington Office.

These consultations differ from "conservation reviews" (see (A) above) in that (1) specific species affected by the action can be identified; (2) specific actions affecting these species can be described; (3) the effects of the action on the species can be determined during consultation; and (4) the consultation fulfills an agency's obligation under section 7(a)(2).

Successful conduct of these consultations requires the Regions to provide strong support to their team member, including funding and staff time to complete their portion of the work, and the Washington Office to designate a liaison to facilitate the consultation.

Program-specific protocols developed for recurring national consultations, like EPA's pesticide registration program, will be included in this section as they are completed.

Pesticide consultations

This section sets forth the mutually agreed protocol (policies and procedures) the Services follow to ensure compliance with section 7 of the Endangered Species Act when coordinating with action agencies regarding the use of pesticides for pest management activities. The protocol is relevant to consultation with the Environmental Protection Agency (EPA) on registration of pesticides under the Federal Insecticide, Fungicide, and Rodenticide Act (FIFRA).

This guidance is intended to facilitate consistency among Regions, field stations, and the Washington Office, and conformance with the section 7 regulations when conducting consultations and conferences on the registration and use of pesticides. Appropriate roles and responsibilities are assigned for the various Service components participating in the consultation process. A more complete and efficient evaluation of potential impacts on Federally listed and proposed species is also facilitated.

Standard procedures for conducting pesticide consultations

As a result of the tremendous interest in this issue exhibited by the regulated community, pesticide users, and the general public, the Services must be consistent in its national, regional, and field office conduct of pesticide consultations. Because of the potentially far-reaching impacts of pesticides on fish, wildlife and plant resources, the Services must provide the necessary resources to develop biological opinions adequately addressing these impacts.
Registration of pesticides is an action with geographically broad effects involving more than one Region; therefore, most of EPA's pesticide registration consultations are handled programmatically.

As the action agency responsible for most pesticide registrations, EPA is usually the agency requesting consultation on pesticide activities. These consultations review the potential impacts of all registered uses of the pesticide(s) on all listed species. EPA may combine the registration of several pesticides, herbicides, or other compounds into a single consultation request based on similarity of chemical action, registered use (such as mosquito larvicides), or other likeness. Occasionally, EPA requests a case-by-case consultation on a specific pesticide when conditions warrant, such as when special uses or needs require earlier consultation than would occur on a programmatic basis.

The FWS is developing a standing national team consisting of (1) a coordinator from the Division of Endangered Species' Washington Office (TE), (2) at least one biologist from each of Regions 1-6, and (3) an Environmental Contaminants Coordinator from the Division of Environmental Contaminants (DEC). The DEC coordinator will facilitate appropriate technical review and interpretation of toxicological data. Regional and field office contaminants specialists will be assigned to provide additional technical assistance to the team, as determined by the EC Coordinator. National pesticide consultations coordinated at the Washington level by TE are signed by the Assistant Director for Trust Resources.

Federal agencies (e.g., the Forest Service) also may request consultation on activities involving use of specific pesticides. An action involving more than one Region may require formation of a team representing the affected Regions. The lead region, generally the Region most affected, prepares the biological opinion with appropriate input from other Regions. While Endangered Species staff have lead for conducting consultations, all consultations involving registration or use of pesticides are closely coordinated with appropriate Environmental Contaminants staff. Roles and responsibilities of Service staff involved in pesticide consultations are discussed below.

Responsibilities

Regional Directors are responsible for:

- o designating appropriate participants for national pesticide consultation teams;
- o designating appropriate individuals to provide technical assistance to national pesticide consultation teams;
- o providing the Washington Office with a complete list of species and critical habitats that may be affected by proposed actions subject to national and multi-regional consultations;
- o providing access to available data and/or resources facilitating consultation; and
- o issuing biological opinions when designated the lead region in multi-regional consultations and when pesticide consultations occur within a given region under certain special circumstances (e.g., experimental use permits).

Recognizing the extremely heavy workload associated with conducting pesticide consultations, Regional Directors are to ensure that participants on the national pesticide consultation team, and staff assigned to provide technical assistance, are relieved of other major duties and responsibilities commensurate with the level of effort needed to complete their consultation duties.

Responsibilities of national and multi-regional pesticide consultation teams and the Washington Office are:

Informal consultation phase:

While section 7 regulations only require preparation of biological assessments for major construction actions, EPA has agreed to provide biological assessments for pesticide consultations.

A biological assessment, based on the best scientific and commercial data available, documents the agency's determination of effect and whether formal consultation or conference is needed. Upon receipt of the agency's biological assessment, the Endangered Species Coordinator (Washington Office) will provide a copy to the EC Coordinator, initiating technical review of data and conclusions provided.

The regulations allow the Services 30 days to provide the action agency a written response to the findings of a biological assessment. To meet this deadline, participants in the technical review provide written comments to the EC Coordinator within 15 days. The length and complexity of many biological assessments evaluating potential impacts of toxic chemicals may make this

timeframe inadequate for the review. The EC Coordinator contacts the TE Coordinator as soon as possible, but not later than 20 days after receipt of the assessment, if a request for an extension is needed. The request includes an approximate completion time.

DEC's role is to (1) provide technical review of the biological assessment and determine if the best scientific and commercial data have been provided by EPA, (2) provide the team with technical support in determining the chemical and biological mode of action of the compound(s) under review, (3) review the draft biological opinion for technical accuracy and comment on the feasibility of the reasonable and prudent alternatives and measures offered, and (4) aid the team in evaluating EPA's comments on the draft.

A complete biological assessment includes, but is not limited to, discussion of the following:

General Information:

- o specific definition of terms used to describe use sites, e.g., pastureland, wasteland, fallow land, rangeland, non-crop uses;
- o a complete, accurate distribution of cropland (at least on the county level) and/or use sites (with definitions of terms);
- o registered uses of pesticides under consideration;
- o product labels supporting the registered uses;
- o data generated from site visits and field surveys; and
- o a comprehensive summary of available technical literature (copies of scientific studies and literature supporting the risk assessment, if available).

Risk Assessment Information:

- o the complete range of exposure pathways (e.g., dietary, respiratory, dermal);
- o potential degree of exposure of affected species, their symbionts, host and pollinator species, food sources, etc.;
- o persistence of the substance in aquatic and terrestrial environments;
- o toxicity of the pesticide and its metabolites to all life stages of affected species;
- o history of poisonings;

- o bioaccumulation;
- o interference with habitat, symbionts, or other special relationships; and
- o discussion of lethal and sublethal effects, effects of metabolites, chronic toxicity and exposure, environmental fate and transport, and effects of multiple applications.

Finally, EPA should make a "no effect" or "may affect" finding for each species.

Concurrence phase:

Upon receipt of the biological assessment, the national team leader evaluates the document and determines, in conjunction with the team members and technical review team, the amount of time required for adequate review. If more than 30 days is needed for the review, an acceptable timeframe is negotiated with the action agency. A joint review of the document is undertaken as expeditiously as possible, and any requests for additional information and recommended revisions are made through TE for national consultations or the Regional Director for multi-Regional consultations. Within 30 days of receiving a complete biological assessment (or other timeframe agreed upon by the Service and the action agency), the national team forwards its recommendation of concurrence or nonconcurrence with the action agency findings to the Assistant Director for Trust Resources. The multi-Regional team submits its recommendations to the lead Regional Director.

Upon receipt of the national team recommendation, the Washington Office (TE) prepares a response to the action agency discussing the outcome of the Service review and, in the case of non-concurrence, providing rationale supporting the Services' position. The response notifies the agency of the need to initiate formal consultation, as appropriate.

Formal consultation phase:

Section 7 regulations allow 90 days to conduct formal consultation and an additional 45 days to complete the biological opinion, for a total of 135 days from receipt of the initiation request to delivery of the consultation. Given the workload involved in conducting programmatic and multi-Regional pesticide consultations, these consultations generally cannot be completed within the regulatory timeframe. TE negotiates an acceptable timeframe for completing national pesticide consultations and requests extensions, as necessary, based on recommendations from the consultation coordinator. The lead Regional Director requests appropriate extensions for multi-Regional consultations.

Draft and final biological opinions are transmitted to the action agency through the Washington Office (TE) for national consultations, and through the lead Regional Office for multi-Regional consultations, except when a multi-Regional opinion is signed by the Assistant Director for Trust Resources.

Formal pesticide consultations follow the format provided in this chapter. Draft and final biological opinions associated with national pesticide consultations and multi-Regional biological opinions signed by the Assistant Director receive joint TE/DEC review before they are sent to the action agency.

Procedures for pesticide consultations with special conditions

Consultation requests may be directed to specific Regional and field offices for actions involving emergency exemptions (FIFRA section 18), Special Local Needs (FIFRA section 24 (c)), Experimental Use Permits (FIFRA section 5), and field study proposals (FIFRA section 3(c)(2)(B)).

Pesticide registrants, parties acting on behalf of the registrants, or pesticide State Lead Agencies frequently contact Regional and field offices directly regarding these pesticide actions. Through EPA, they often request biological opinions to facilitate the use of particular chemicals, without providing adequate time to fully evaluate proposed actions. In many instances, the Services lack access to complete information regarding the toxicity and environmental fate of pesticides under consideration and other data necessary to assess potential impacts on listed species. TE and DEC will continue to work with EPA to develop appropriate procedures to address these specific situations. In the interim, Regions and field offices use the following procedures.

- Only EPA may initiate formal consultation, and EPA is involved in any informal consultations unless a non-Federal representative is formally designated. The consultation request contains explicit information identifying the location of the proposed action, and an ecological risk assessment evaluating pertinent toxicity, exposure, and environmental chemistry data needed to determine potential impacts on listed species.

- Requests for expedited consultations are evaluated on a case-by-case basis and accommodated to the maximum extent practicable and consistent with existing priorities. The Regional Director is alerted when Regions and field offices detect a pattern of requests for emergency or expedited consultations for certain chemicals and uses. The Regional Director may then elevate the matter to the ATS, with appropriate documentation. ATS and TE will work with EPA headquarters to resolve the matter.

- o Emergency consultation provisions of the section 7 regulations (50 CFR §402.05) apply to situations involving acts of God, disasters, casualties, national defense or security emergencies. When an emergency use of pesticides is necessary (e.g., pesticides are necessary to prevent an imminent human disease outbreak), consultation may be conducted informally through alternative procedures determined to be consistent with the requirements of section 7. (See emergency consultation procedures in chapter 7)

Standardized statements for pesticide analyses only

Terms and conditions:

Disposition paragraph for pesticide situations:

> **The U.S. Fish and Wildlife Service (in the Region of the species' occurrence) must be notified by (action agency) immediately of any dead or sick individuals found in or adjacent to pesticide-treated areas. Cause of death or illness, if known, should be conveyed to these offices:** [List appropriate Regional contact].
>
> **The Service has provided a protocol for the handling of dead, injured or ill listed species for pesticide analysis. When the (agency) suspects a species has been taken in violation of label restrictions, the incident(s) shall be reported to the U.S. Fish and Wildlife Service, Division of Law Enforcement or their designee in the Region in which the species is found. Instructions for proper handling and disposition of such specimens will be issued by the Division of Law Enforcement.** [Include Law Enforcement contacts for appropriate Region(s)].

[The referenced protocol for pesticide situations can be found in Appendix F.]

Monitoring for pesticides (EPA or FDA):

> **The agency shall monitor incidental take to ensure compliance with anticipated take levels as required by 50 CFR §402.14(i)(3). The Service believes that a label or bulletin requirement for users to immediately report any dead or sick listed species found in or adjacent to pesticide use areas would assist the (Environmental Protection Agency/Food and Drug Administration) in meeting this requirement. Such a requirement provides an incentive to the user to report such incidents to remain exempt from section 9 taking provisions. However, the Service also believes the agency should strengthen its information gathering base by obtaining assistance from State or Federal wildlife or plant agencies, the Extension Service, Department of Agriculture cooperatives or educational or private organizations in reporting possible listed species take from pesticides.**

Water quality consultations

This section is reserved pending ongoing negotiations on consultation procedures for this EPA program.

Other national consultations

In the future, several other programs will probably generate national consultation requests. For example, State programs to assume administration of section 404 of the Clean Water Act may require a programmatic conservation review and/or development of specific national consultation procedures.

(C) Regional or Ecosystem Consultations

Action agencies occasionally request multi-action and "ecosystem-based" consultations. These consultations may be step-downs of conservation reviews or national consultations. In these instances, a lead Region or field office may be designated. Regional and ecosystem biological opinions may be signed at the Service's Regional Office or State Office level, as appropriate. Examples of these consultations include:

Regional:

- APHIS' program to eradicate the boll weevil in southern cotton growing states, to control grasshoppers and crickets in western states, or to control Mediterranean fruit flies in the Southwest.

Ecosystem:

- A Region 6-led consultation on the continuing operations of all Corps dams on the Missouri River and their effects on listed species within that aquatic ecosystem (bald eagle, piping plovers, Interior least terns and the pallid sturgeon).

- A Region 3 consultation on operation of Corps facilities along the breadth of the Upper Mississippi River.

- A Region 2-led consultation with the Bureau of Reclamation on regulations to implement water entitlements on the Lower Colorado River.

- A Region 1-led consultation with the BLM on grazing activities throughout the range of the desert tortoise, and other program activities within the proposed critical habitat.

Consideration should be given to conducting ecosystem-based consultations, particularly in areas undergoing large HCPs, with the Federal agencies whose future activities may affect one or more species within a regional planning area. This type of consultation would involve programmatic review of the

agencies' activities and would be most effective if conducted simultaneously with development of the HCP. Such an approach could involve a single lead agency, if there is a predominant Federal agency influence (e.g., the Bureau of Reclamation in the Central Valley of California), or could involve a limited number of agencies representing Federal programs in the planning area. Such simultaneous consideration of both Federal and nonFederal programs could (1) assist in assessing overall effects on a species/group of species/ecosystem from multiple actions; (2) result in a better determination of the respective roles of all the parties in conserving the species/ecosystem, (3) assist in determining the priority of all proposed actions for use of any "resource cushion" that may exist, and (4) demonstrate that all parties are being provided equal consideration at equal speed (programmatic consultations do not have applicants and are subject to mutually agreed timeframes).

The Region 2 consultation on the Lower Colorado may be conducted along with an HCP proposed to cover nonFederal activities and candidate species.

4.8 HANDLING CLASSIFIED DOCUMENTS

National security classified documents used during consultation require specialized handling.

- Only personnel trained and qualified to handle such documents may do so. Security clearances are regularly checked to determine they are still current.

- If classified information is included in the biological opinion, that portion of the document is covered by a derivative classification (and must be marked and protected accordingly), and can be reviewed only by appropriate personnel with the required security clearance who have a need to know.

- All classified documents are to be maintained in files secured for their level of security. See Departmental regulations for handling of such files.

- Classified information is exempt from disclosure under FOIA.

When classified documents or information will be required for a consultation, check with the Regional Office and the Department's Security Office in Washington, DC [(202) 208-4108] for current procedures and names of personnel with appropriate security clearances who are authorized to review the classified information.

4.9 PROTECTION OF CONFIDENTIAL BUSINESS INFORMATION

During the course of consultations, some of the information received or gathered may contain trade secrets and commercial or financial information that is prohibited from release by Federal statute. Further, under the Freedom of Information Act (FOIA) information may be exempted if its release would cause competitive harm to the submitter, would impair the Government's ability to gather necessary information in the future, or would interfere with compliance or program effectiveness. If the information was provided to the Services by the action agency, requests for access to, or copies of, the information generally should be referred, under 43 CFR 2.15(c), to the agency that collected the information for a determination concerning release. If the Services obtained the information directly from the businesses or organizations (including sole proprietorships), the Services will generally need to make a determination concerning release in accordance with the FOIA (Part 203 of the Fish and Wildlife Manual). Contact your Regional FOIA Coordinator or the Services' FOIA Officer for assistance in processing such requests.

4.10 DISTRIBUTION OF FINAL FORMAL CONSULTATION DOCUMENTS

Upon completion, the formal consultation package is provided promptly to the action agency and the applicant, if any. Any designated non-Federal representative, other than the applicant, involved in the informal stage of the consultation, is not a party to the formal consultation. Except by prior agreement, the action agency provides copies to other interested parties. For example, EPA is responsible for distributing pesticide consultation documents. However, if this cannot be encouraged, the Services provide copies upon request, after sufficient time (10 working days) has passed to ensure the action agency has received the consultation.

Exceptions to this waiting period include providing copies simultaneously to appropriate State agencies when there is a joint Federal-State consultation action, and the requirement to send electronic copies of all formal, early, and emergency consultation and conference documents (just the final product, not the administrative files) to the Division of Endangered Species in Washington (cc Mail box = R9FWE_DES).

Consultations containing classified material or confidential business information follow procedures laid out in 4.8 and 4.9 above.

CHAPTER 5 - CONFERENCE

"Each Federal agency shall confer with the Secretary on any agency action which is likely to jeopardize the continued existence of any species proposed to be listed ... or result in the destruction or adverse modification of critical habitat proposed to be designated for such species. This paragraph does not require a limitation on the commitment of resources as described in subsection (d)."

Section 7(a)(4) of the Endangered Species Act of 1973

5.1 THE NEED FOR CONFERENCE

Section 7(a)(4) was added to the ESA to provide a mechanism for identifying and resolving potential conflicts between a proposed action and proposed species at an early planning stage. While consultations are required when the proposed action may affect listed species, a conference is conducted when the proposed action may present the likelihood of jeopardizing the continued existence of a proposed species or destroying or adversely modifying proposed critical habitat. However, Federal action agencies may request a conference on any proposed action that may affect proposed species or proposed critical habitat. The Services also can request a conference after reviewing available information suggesting a proposed action is likely to jeopardize proposed species or destroy or adversely modify proposed critical habitat.

5.2 INFORMAL CONFERENCE

Conferences may involve informal discussions among the Services, the action agency, and the applicant (if any). During the conference, the Services advise the action agency on ways to avoid or minimize adverse effects to proposed species or proposed critical habitat (Figure 5-1).

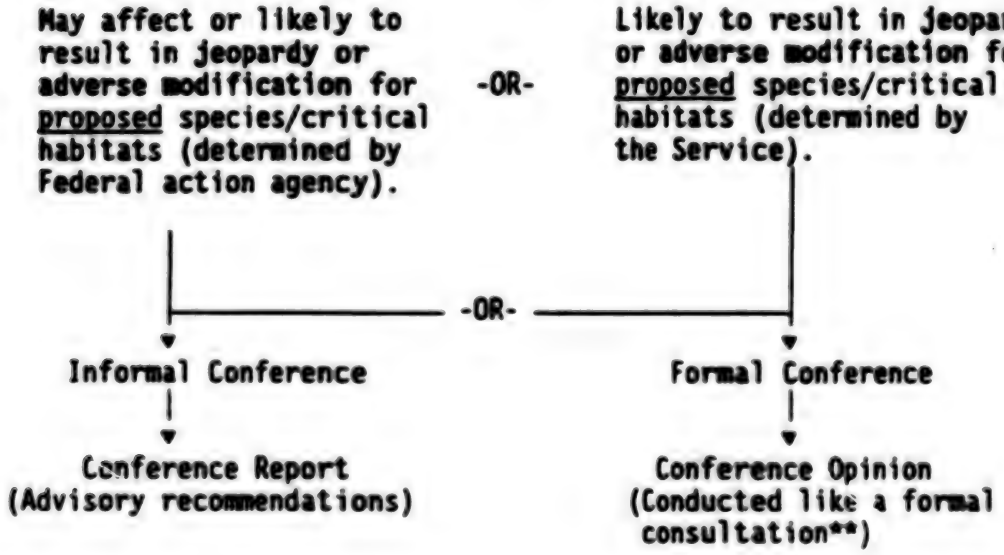
(A) Conference Report

Following informal conference with the action agency, the Services issue a conference report containing recommendations for reducing adverse effects. These recommendations are advisory because the action agency is not prohibited from jeopardizing the continued existence of a proposed species or destroying or adversely modifying proposed critical habitat until the species is listed or critical habitat is designated. However, as soon as a listing becomes effective, the prohibition against jeopardy or adverse modification applies regardless of the action's stage of completion. Therefore, action agencies should treat the conference report's recommendations seriously (Figure 5-2).

(B) Conference Notice

If the Services determine an action is likely to jeopardize a proposed species or destroy or adversely modify proposed critical habitat, it notifies the action agency of a need for conference. This takes the form of a letter or memorandum if the action is likely to jeopardize only a proposed species or adversely modify a proposed critical habitat. When the Services are already in consultation on listed species or designated critical habitats, a conference notice is appended after the incidental take statement.

Figure 5-I Conference processes *



* Informal discussions can occur anytime during the process.
** Incidental take statement does not become effective unless the Services adopt the opinion once the listing is final.

5.3 FORMAL CONFERENCE

Action agencies may request formal conference on a proposed action. Although the regulations (50 CFR §402.10(d)) permit the Services to decide whether formal conference is appropriate, it should provide the requested conference unless a major uncertainty prevails, such as lack of sufficient data on which to base a thorough determination of effects.

Formal conferences follow the same procedures as formal consultation. The opinion issued at the end of a formal conference is called a conference opinion. It follows the contents and format of a biological opinion, however, the incidental take statement provided with a conference does not take effect until the Services adopt the conference opinion as a biological opinion on the proposed action after the species is listed.

(A) Timeframes of Formal Conferences

Section 7 regulations provide no specific schedule for conferences. However, by policy, formal conferences will follow the same timeframes as formal consultations. The timing of a formal conference can be affected by the finalizing of a listing package. If a listing proposal is made final during the conference, and the proposed action still may affect the species, then the formal conference ends and formal consultation begins. The subsequent formal consultation timeframes begin with the request from the action agency for formal consultation.

(B) Format of Conference Opinion

Stand-alone conference

A stand-alone conference opinion addresses only proposed species or proposed critical habitat, and has the same format and contents as a final biological opinion (chapter 4). A sample of a stand-alone conference opinion can be found in Appendix B, with modified standardized statements for formal conference including the following:

In jeopardy or adverse modification opinions:

> Based on the foregoing analysis, the Service concurs with the agency that the (proposed action) is likely to (jeopardize the continued existence of the proposed species and/or destroy or adversely modify the proposed critical habitat). While the ESA does not preclude an agency from taking an action with such adverse effects on a proposed (species/critical habitat), the (agency) is reminded that if the (species is listed/critical habitat is designated) prior to the completion of the action or while (agency) still maintains any discretionary authority relative to the action the (agency) will be required to insure against such adverse effects. The (agency) may be required to modify or suspend the action at that time pending resolution of the requirement to formally consult under section 7. Consequently,

the Service advises (the agency) to consider implementing the following reasonable and prudent alternative(s).

In the incidental take statement:

> The prohibitions against taking the species found in section 9 of the ESA do not apply until the species is listed. However, the Service advises the (agency) to consider implementing the following reasonable and prudent measures. If this conference opinion is adopted as a biological opinion following a listing or designation, these measures, with their implementing terms and conditions, will be nondiscretionary.

Once the proposed species or critical habitat listing is made final, the action agency writes the Services requesting that the conference opinion be confirmed as a biological opinion.

Conference included in a formal consultation

When both listed and proposed species or critical habitats are affected by a proposed action, the Services advise the action agency of the presence of the proposed species or proposed critical habitat and determines whether the agency wants them considered during the formal consultation. If the agency does not, the Services may include a conference notice in the consultation. However, if they are considered, the analyses for these species/critical habitat are included in the same sections as the listed species, using the standardized statements in 5.2(B)(1). A sample of a combined formal/conference consultation can be found in Appendix B.

(C) Confirmation as a Formal Consultation

Requests for Service confirmation of a conference opinion must be in writing. The Services must respond within 45 days, and, within that timeframe, may adopt the conference opinion as the biological opinion issued through formal consultation if no significant changes have occurred in the proposed action or the information used in the conference. When the conference opinion is adopted in this manner, it satisfies an action agency's section 7 consultation requirements. If the Services deny the confirmation request, it advises the action agency to initiate formal consultation unless the "may affect" situation has been eliminated.

The standard closing statement for formal conferences is as follows:

> This concludes the conference for (action). You may ask the Service to confirm the conference opinion as a biological opinion issued through formal consultation if the (species is listed or critical habitat is designated). The request must be in writing. If the Service reviews the proposed action and finds that there have been no significant changes in the action as planned or in the information used during the conference, the Service will confirm the conference opinion as the biological opinion on the project and no further section 7 consultation

will be necessary.

After (listing of the (species) as endangered/threatened and/or designation of critical habitat for (species)) and any subsequent adoption of this conference opinion, the Federal agency shall request reinitiation of consultation if: (1) the amount or extent of incidental take is exceeded; (2) new information reveals effects of the agency action that may affect the species or critical habitat in a manner or to an extent not considered in this conference opinion; (3) the agency action is subsequently modified in a manner that causes an effect to the species or critical habitat that was not considered in this conference opinion; or (4) a new species is listed or critical habitat designated that may be affected by the action.

The above paragraph is needed for conference opinions on proposed species only.

The incidental take statement provided in this conference opinion does not become effective until the species is listed and the conference opinion is adopted as the biological opinion issued through formal consultation. At that time, the project will be reviewed to determine whether any take of the (species/habitat) has occurred. Modifications of the opinion and incidental take statement may be appropriate to reflect that take. No take of the (species/habitat) may occur between the (listing of the (species) and the adoption of the conference opinion through formal consultation, or the completion of a subsequent formal consultation.

Figure 5-2 Comparison of the conference and consultation provisions of the Endangered Species Act

	Conference	Consultation
Authority	§7(a)(4)	§7(a)(2)
When required	Federal action to fund, authorize or carry out an action is likely to jeopardize proposed species or destroy or adversely modify proposed critical habitat.	Federal action to fund, authorize or carry out an action may affect listed species or designated critical habitat.
Types of service	Informal conference - informal discussions resulting in advisory recommendations on ways to minimize or avoid adverse effects, avoid jeopardy, or adverse modification. If the species is listed or the critical habitat is designated before the action is completed, the need for formal consultation must be determined.	Informal consultation - informal discussions resulting in advisory recommendations on ways to avoid adverse effects. If adopted, may lead to a concurrence that the action is not likely to adversely affect the species/habitat. ESA obligation is completed, based on the Services' concurrence.
	Formal conference - at the agency's request, and Service concurrence, the formal process for consultation will be followed, resulting in an opinion that can stand as the biological opinion for the action if no significant new information or change in the action develops. The incidental take statement is not effective unless the Services adopt the conference opinion once the proposed species is listed	Formal consultation - a formal process with regulated timeframes, that results in development of a biological opinion and incidental take statement.

	Conference	Consultation
Agency responsibilities	Formal conference - None, but a prudent agency would adopt any reasonable and prudent alternatives and incidental take terms and conditions if the conference opinion is expected to be adopted as the biological opinion following listing.	Formal consultation - Adopt the reasonable and prudent alternatives and incidental take terms and conditions, or do not undertake the action, or apply for an exemption.
Irreversible and irretrievable commitment of resources precluding formulation or implementation of reasonable and prudent alternatives - §7(d)	Not applicable, but a prudent agency would not make such a resource commitment if the conference opinion is to be adopted as the biological opinion following listing.	Cannot be made between the "may affect" finding and conclusion of formal consultation.
Incidental Take	Informal conference - Not required.	Informal consultation - Not required.
	Formal conference - Required to be addressed in the conference opinion but not effective until adopted by the Services after the species is listed.	Formal consultation - Required (may be zero) except for plant species.

CHAPTER 6 - EARLY CONSULTATION

" ... a Federal agency shall consult with the Secretary on any prospective agency action at the request of, and in cooperation with, the prospective permit or license applicant if the applicant has reason to believe that an endangered species or a threatened species may be present in the area affected by his project and that implementation of such action will likely affect such species."

Section 7(a)(3) of the Endangered Species Act

6.1 ELIGIBILITY FOR EARLY CONSULTATION

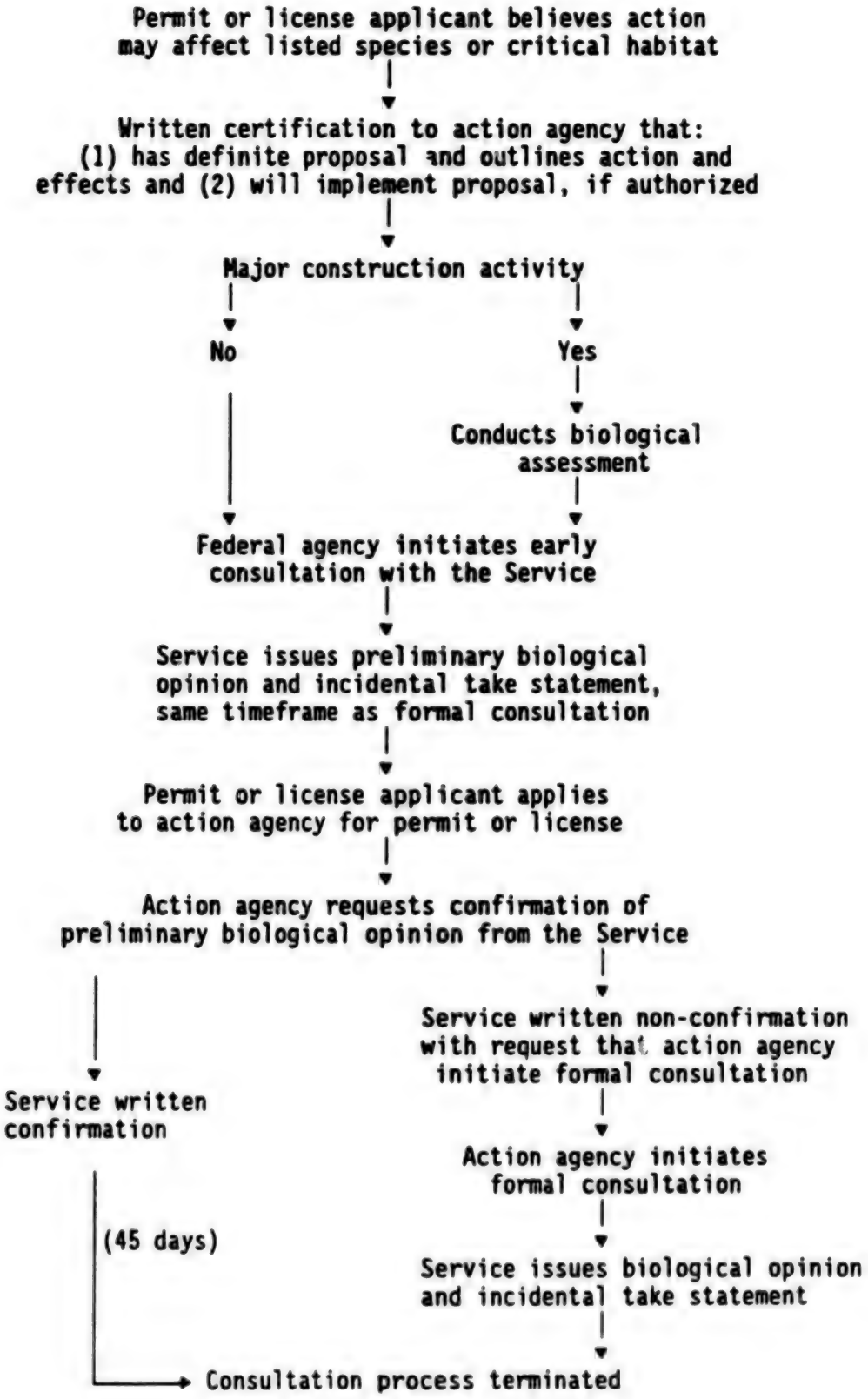
Section 7(a)(3) of the ESA was added in the 1982 amendments, and is addressed in section 402.11 of the regulations. Early consultations are intended to reduce the potential for conflicts between listed species or critical habitat and proposed actions. Early consultation is an optional process that occurs before a prospective applicant files an application for a Federal permit or license, frequently referred to as pre-application (Figure 6-1). To qualify, a prospective applicant must:

- o provide a definite proposal outlining the action and its effects; and
- o certify that he or she intends to implement the proposal if it is authorized.

If the prospective applicant provides the action agency with this information in writing, the ESA requires the action agency to initiate early consultation with the Services. This request must be in writing and contains the same information required for formal consultation (50 CFR §402.14(c)). Action agencies conducting an early consultation use the same procedures and have the same responsibilities as they do for formal consultations. Although early consultation is conducted among the Services and the action agency, the prospective applicant should be involved throughout the process.

A long "early consultation" example (Shorelands project in San Francisco Bay) is included in Appendix C.

Figure 6-1. Early Consultation Process



6.2 PROCEDURES

> ***"(2) Consultation under subsection (a)(3) shall be concluded within such period as is agreeable to the Secretary, the Federal agency, and the applicant concerned."***
>
> Section 7(b)(2) of the Endangered Species Act

By policy the procedures and timeframes for early consultation are the same as those for formal consultation (chapter 4). The action agency's request for initiation of early consultation must be accompanied by the information described in 50 CFR §402.14(c). If the prospective activity involves a major construction activity, the action agency must prepare a biological assessment before initiating early consultation.

Preliminary biological opinions prepared for early consultations are nearly identical to biological opinions prepared for formal consultations because they can be confirmed as a final biological opinion once the prospective applicant submits a permit application to the action agency. The major difference between a preliminary biological opinion and a final biological opinion lies in the incidental take statement, which is not effective until the early consultation is confirmed as a formal consultation. A sample of an early consultation document can be found in Appendix B, with modified standardized statements including the following:

Closing of incidental take statement:

> Because the proposed action is likely to have adverse effects on listed species, the Service has included an incidental take statement pursuant to section 7(b)(4) of the ESA. However, because this is an early consultation on the prospective action, this incidental take statement does not eliminate the (agency)'s liability under the taking prohibitions of section 9 of the ESA.
>
> Instead, this statement provides your agency with foreknowledge of the terms and conditions that will be required if this prospective application is filed with your agency. These reasonable and prudent measures and implementing terms and conditions become effective only after the Service confirms the preliminary biological opinion as a final biological opinion on the prospective action.

6.3 CONFIRMATION AS A FINAL BIOLOGICAL OPINION

> ***"(B) Consultation under subsection (a)(3) of this section, and an opinion issued by the Secretary incident to such consultation, regarding an agency action shall be treated respectively as a consultation under subsection (a)(2) of this section, and as an opinion issued after consultation under such subsection, regarding that action if the Secretary reviews the action before it is commenced by the Federal agency and finds, and notifies such agency, that no significant changes have been made with respect to the action and that no significant change has occurred regarding the information used during the initial consultation."***
>
> Section 7(b)(3)(B) of the Endangered Species Act

At the conclusion of an early consultation, the Services issue a preliminary biological opinion that has the same format and contents as a final biological opinion. Once the prospective applicant formally applies for a permit or license from the action agency, and before final action is taken on the application, the action agency writes the Services to request confirmation of the preliminary biological opinion as a final biological opinion. Within 45 days, the Services confirm or deny the preliminary opinion as final if there are no significant changes in the proposed action or the information used in the early consultation. If the Services confirm the preliminary opinion as final, that action satisfies the action agency's section 7 consultation requirements. If the Services deny the request, it asks the action agency to initiate formal consultation. To make the action agency aware of the opportunity to confirm the early consultation the following closing paragraph is used:

> This concludes early consultation for the (action). You may ask the Service to confirm this preliminary biological opinion as a final biological opinion on the prospective action once you receive the permit application from the prospective applicant. The request must be in writing. If the Service reviews the proposed action and finds that there are no significant changes in the action as planned or in the information used during the early consultation, it will confirm the preliminary biological opinion as a final biological opinion on the project and no further section 7 consultation will be necessary except when one of the following criteria for reinitiation is met: (1) the amount or extent of incidental take is exceeded; (2) new information reveals effects of the agency action that may affect listed species or critical habitat in a manner or to an extent not considered in this opinion; (3) the agency action is subsequently modified in a manner that causes an effect on the listed species or critical habitat that was not considered in this opinion; or (4) a new species is listed or critical habitat designated that may be affected by the action. When the amount or extent of incidental take is exceeded, any operations causing such take must cease pending reinitiation.
>
> If the Service does not confirm this preliminary biological opinion as a final biological opinion on the prospective action, the (agency)

is required to initiate formal consultation with the Service.

A sample letter to prospective applicants about early consultation rights.

Dear _____:

This responds to your letter of _____ , ____, concerning the upcoming proposed experimental use of _____ _____. This agricultural chemical was previously used in [State] under the U.S. Environmental Protection Agency's (EPA) Experimental Use Permit (EUP) ___-EUP-__ _.

We have enclosed a general list of all endangered, threatened, and proposed species in [State], organized by county, for planning purposes. When specific test plots have been designated, EPA should consult with this office pursuant to section 7(a)(2) of the Endangered Species Act of 1973, as amended, prior to the issuance of the EUP for _____.

The enclosed list constitutes technical assistance only. It does not fulfill EPA's requirements pursuant to section 7 of the Endangered Species Act of 1973, as amended; only EPA or their non-Federal designee can fulfill those requirements. By copy of this letter, EPA's Office of Pesticide Programs is being made aware of their responsibility to consult with the Fish and Wildlife Service to insure that any action it authorizes, funds, or carries out is not likely to jeopardize the continued existence of listed species or result in destruction or adverse modification of critical habitat. We hope the resulting dialogue between EPA and the FWS will provide registrants and permittees with better guidance on compliance with the Endangered Species Act. If EPA chooses not to consult, the FWS cannot be certain that EPA, and your project, has complied with the provisions of the Endangered Species Act.

Nevertheless, you should be aware that, pursuant to section 7( )(3) of the Endangered Species Act, you have certain rights as an applicant for a Federal permit or license. Section 7(a)(3) and implementing regulations at 50 C.F.R. §402.11 establish a process called "early consultation", which was specifically designed to reduce the likelihood of conflicts between listed species or critical habitat and prospective actions such as yours. Although the consultation would be between EPA and the FWS, your office can be involved throughout the early consultation process.

Copies of the specific regulations pertaining to early consultations are enclosed. If you have reason to believe that your proposal, which will eventually be included in an application for Federal agency approval, may affect listed species or critical habitat, you can ask the Federal agency issuing a permit or license (in this case it is EPA) to enter into early consultation with the FWS.

Your request must be in writing and must certify that: (1) you have a definitive proposal outlining your action and its effects, and (2) that you intend to carry out your proposal if it is authorized. When EPA receives your proposal, they are required by the Endangered Species Act to initiate early consultation with the FWS.

If you have questions regarding our comments, please contact [Biologist] at

CHAPTER 7 - EMERGENCY CONSULTATION

7.1 THE NEED FOR EMERGENCY CONSULTATION

Section 7 regulations recognize that an emergency (natural disaster or other calamity) sometimes requires expedited consultations (50 CFR §402.05).

At such times the requesting agency feels a sense of urgency that makes additional administrative work burdensome. Emergency consultations should be handled with as much understanding as possible while ensuring that anticipated actions will not violate sections 7(a)(2) or 7(d). Emergency consultation procedures allow action agencies to incorporate endangered species concerns into their actions during the response to an emergency.

An emergency is a situation involving an act of God, disasters, casualties, national defense or security emergencies, etc., and includes response activities that must be taken to prevent imminent loss of human life or property. Predictable events, like those covered in Emergency Use Permits issued by the Environmental Protection Agency for pesticide applications, usually do not qualify as emergencies under the section 7 regulations unless there is a significant unexpected human health risk.

7.2 PROCEDURES FOR HANDLING EMERGENCY CONSULTATIONS

(A) Initial Contact by the Action Agency

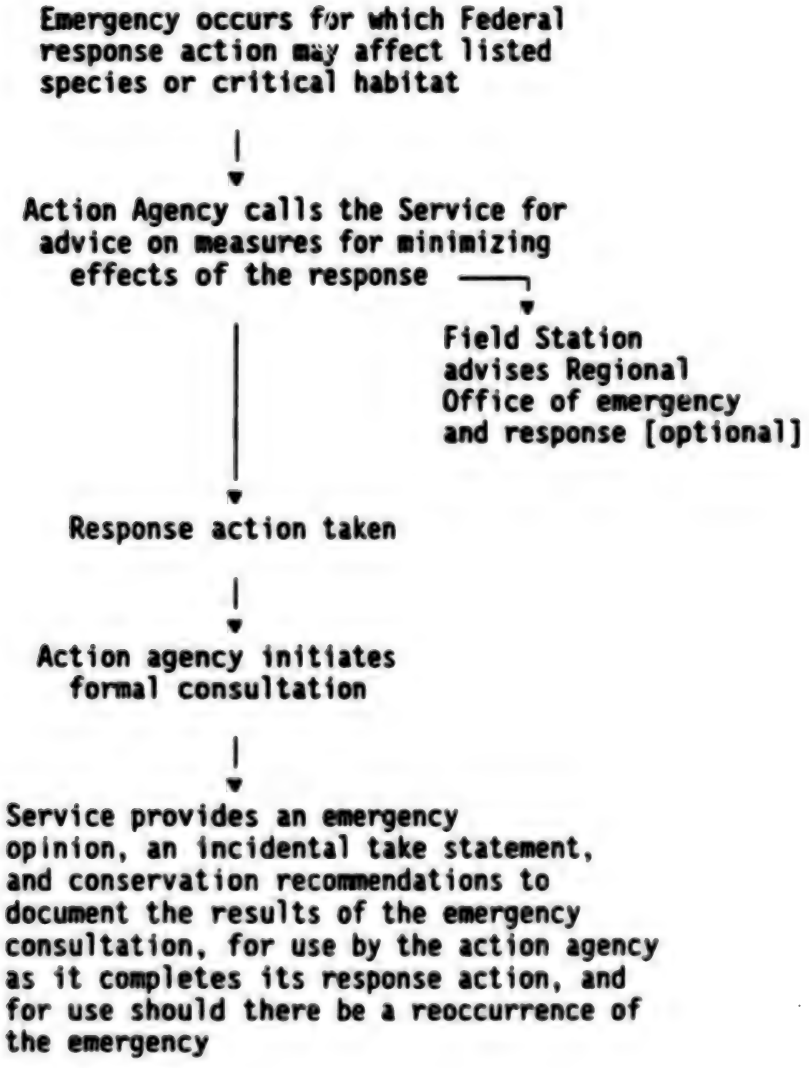
The initial stages of emergency consultations usually are done by telephone or facsimile, followed as soon as possible by written correspondence -- within 48 hours if possible so the Services can ensure an accurate record of the telephone contact. This record also provides the requesting agency with a formal document reminding them of the commitments made during the initial step in emergency consultation (Figure 7-1). During this initial contact, or soon thereafter, the Services' role is to offer recommendations to minimize the effects of the emergency response action on listed species or their critical habitat (the informal consultation phase). Do not stand in the way of the response efforts.

If this initial review indicates the action may result in jeopardy or adverse modification, and no means of reducing or avoiding this effect are apparent, then the agency should be so advised, and the Services' conclusions documented.

Project leaders should establish procedures (e.g., a calling tree) within their offices outlining who can be called to handle the emergency consultation. Once these procedures have been established, they should be provided to all Federal agencies in that operating area responsible for handling emergency situations (e.g., Coast Guard, Environmental Protection Agency, and Federal Emergency Management Agency).

The Field Office conducting the consultation should notify the Assistant Regional Director responsible for endangered species, following timeframes established by Regional guidance. The notification should be in memo form, following the format outlined in Exhibit 7-1. Early telephone notification may be required.

Figure 7-1. Emergency Consultation Process



(B) Initiating Formal Consultation

Once the emergency is under control, the action agency initiates formal consultation with the Services. Although formal consultation occurs after the response to the emergency, it is treated like any other formal consultation. However, the action agency has to provide additional information to initiate a formal consultation following an emergency:

- a description of the emergency:
- a justification for the expedited consultation: and
- an evaluation of the response to and the impacts of the emergency on affected species and their habitats.

(C) Emergency Biological Opinion

After concluding formal consultation on an emergency, the Services issue an emergency biological opinion, which in the "effects of the action" section, documents the recommendations given over the telephone or by the facsimile machine. The timeframe, format and contents are the same as for formal consultation (chapter 4). A sample of an emergency consultation document can be found in Appendix B. The standardized statements for formal consultation have been modified to reflect that this is, in most cases, an after-the-fact consultation.

Documenting jeopardy and adverse modification biological opinions is particularly important to tracking the effect on species and habitat conditions. Emergency biological opinions with the conclusion of "not likely to jeopardize" the species or "not likely to result in destruction or adverse modification of critical habitat" are completed at the Field Office level. However, if the conclusion is likely jeopardy or adverse modification, the consultation is elevated to the Regional Office. Such an adverse finding may not have a reasonable and prudent alternative available, unless some further action can restore or enhance the species to a level below the jeopardy threshold.

(D) Incidental Take Statement

If incidental taking is anticipated from the emergency action, the Services can advise the action agency of ways to minimize take, and thus diminish the agency's liabilities under the ESA. In some circumstances the actual or estimated take can be determined, but no after-the-fact take allowance is provided for take occurring without prior Service advice. Use the following standardized statements for incidental take in emergencies.

Successful implementation of Service recommendation:

> On (date), the Service provided the (agency) with the following measures for minimizing the take of (species/habitat): [describe measures provided - or reference, if documented earlier in the consultation]. As the (agency) implemented those measures in its response to the emergency, the requirements for exemption from the taking provisions of section 9 have been met.

Partial success:

> On (date), the Service provided the (agency) with the following measures for minimizing the take of (species/habitat): [describe measures provided - or reference, if documented earlier in the consultation]. To the extent that the [action agency] implemented those measures in its response to the emergency, the requirements for exemption from the taking provisions of section 9 have been met. Any take resulting from incomplete compliance with measures provided by the Service is not covered by the exemption.

No prior contact or the agency failed to implement the measures provided:

> As the (agency) (did not contact the Service to determine the measures to be taken or failed to implement the measures necessary to minimize take of) (species/habitat) during the response to the emergency, any take resulting from the response action does not constitute an exempted take under section 9 of the ESA.

(D) Conservation Recommendations

Emergency consultations may contain conservation recommendations to help protect listed species and their habitats in future emergency situations or initiate beneficial actions to conserve the species.

Exhibit 7-1. Emergency consultation notification memorandum to the Regional Office (optional)

Memorandum

To: Assistant Regional Director, _____

From: Field Supervisor, [name of Field Office]

Subject: Emergency Consultation on [name of Federal action].

This office has completed an informal emergency consultation. The following information summarizes the location of the emergency, nature of the emergency, listed species and critical habitat(s) involved, and how those species and habitats are likely to be affected by the emergency.

Date of Contact: Time:

Contact(s) Name:

Agency:

Contact(s) Title:

Nature of the Emergency:

Species in the Area:

Anticipated Effects:

Recommendations Given the Contact:

CHAPTER 8 - MONITORING AND REPORTING

8.1 MONITORING IMPLEMENTATION/EFFECTS OF REASONABLE AND PRUDENT ALTERNATIVES AND MEASURES

Monitoring, an essential element of interagency consultation, provides the Services with information essential to assessing the effects of various actions on listed species and designated critical habitat. Monitoring allows the Services to refine biological opinions, reasonable and prudent alternatives, reasonable and prudent measures, and terms and conditions. Consequently, monitoring programs should be integral elements of all interagency consultations concluding that an action may adversely affect listed species or critical habitat.

Monitoring programs resulting from interagency consultations should be designed to: (1) detect adverse effects resulting from a proposed action, (2) detect when the level of anticipated incidental take is approached, (3) detect when the level of anticipated incidental take is exceeded, and (4) determine the effectiveness of reasonable and prudent measures. The following objectives/steps should be taken to develop monitoring programs:

- Develop objectives. Any monitoring program associated with section 7 consultations should answer specific questions or lead to specific conclusions, captured in the objectives. If the objectives are well-developed, they will help shape a complete monitoring program.

- Describe the subject of the monitoring program: effects on populations of a listed species, effects on the habitat (critical or not) of a listed species, or effects on both.

- Describe the variables to be measured and how data will be collected. The success or failure of monitoring programs ultimately depends on the information collected about the variables that demonstrate or refute a position outlined in the objectives. Collection methods should be standardized to ensure comparability with data from studies in other areas.

- Detail the frequency, timing, and duration of sampling for the variables. Determining how frequently and how long to collect data is important to the success or failure of the program. If the interval between samples is too long or too short, the monitoring program may not detect an effect. The frequency, timing, and duration of the sampling regimen should relate to the type of action being evaluated, the organism affected by the action, and the response of the organism to the effects produced by the action.

- Describe how the data are to be analyzed and who will conduct the analyses. A monitoring program is more effective when the analytical methods are integrated into the design. For example, parametric and non-parametric statistical analyses require different sample sizes, which will affect the frequency, timing, and duration of sampling.

- Discuss the relationship between the monitoring program being included in a consultation and other monitoring programs. At almost any given time, hundreds of environmental monitoring programs are being conducted in every region of the country. Whenever possible, these should be coordinated to eliminate duplication, standardize sampling methods, or improve geographic coverage.

8.2 TRACKING COLLECTIVE EFFECTS ON SPECIES AND THEIR HABITATS

Managing collected information efficiently improves the overall effectiveness of interagency consultations, and makes it easier to (1) evaluate the effects of various actions as they accumulate over time, (2) determine which consultations need to be reinitiated when a new species is listed, (3) determine when the level of incidental take approaches the likely jeopardy/adverse modification thresholds, (4) exchange similar information across Regional boundaries, and (5) determine if reasonable and prudent alternatives and measures are carried out.

The following set of fields and values form the core of a Regional or Field Office information system on interagency consultation. The fields and values should be part of a computerized information system, maintained on commercially available database management systems. Data are to be maintained for all formal consultations, conferences, early consultations, emergency consultations, and concurrence letters that conclude informal consultations (data on the latter should be kept in case consultations are required because a new species is proposed or listed, or critical habitat is proposed or designated).

The following monitoring system should be maintained in dbf format (x-base) compatible software to facilitate data exchange within the Services on an as needed basis:

Field Name	Field Values
Species Name	For vertebrates, butterflies, and mussels, use the common name in the format used in the official list (50 CFR Part 17). For all other species (primarily invertebrates and plants) use the scientific name. Enter only one name for each record.
Log Number	Enter the log number for the consultation. Use the format: RN-FO-YY-T-XXXX where RN is the Region number, FO is the two-number or letter code for the office, YY is the last two digits of the year, T is the type of consultation (F-formal, I-informal, etc.) and XXXX is a sequential number 0001-9999. Reinitiated consultations use the log number of the original consultation with the letter R added at the end. If there are several reinitiations for the same consultation, the suffix reads as R1 to RX for each new reinitiation.
Record Number	Numerical sequence of the record.
Fiscal Year	Fiscal year of initiation.
Region	Lead Region for consultation.

Office	Service office that issued the document; use a four letter code for field offices or ROn (where n is the Region number) for consultations conducted by a Region.
Action Agency	Standard abbreviation for action agencies where applicable (e.g., EPA, BLM, COE).
Department	Standard abbreviation for the department.
[Applicant	Pursuant to the Privacy Act, do not maintain the applicant's name in this file.]
Action Name	Short name of the proposed action (e.g., Didion bulk transfer facility; Page Avenue extension).
Permit Number	Permit number used by action agency where one exists.
Description	Short description of the proposed action. For example, bulk transfer facility, airport construction, landfill expansion, etc.
State	Standard two letter code for State in which proposed action will occur.
County	County name or code if multiple counties.
Locality	Township, city, or land management area (for example, Shawnee National Forest, Indiana Dunes National Lakeshore) in which action will occur.
Consultation Type	Emergency, Early, Conference, Informal, Formal or Programmatic.
Start Date	For consultations and formal consultations, enter the date consultation was initiated.
Date Issued	Date the document or concurrence letter was issued.
Species Conclusion	Two letter code for the conclusion of the consultation for listed species: NE=No effect; NL=Not likely to adversely affect; LA=Likely to adversely affect; NJ=Not likely to jeopardize; J=Likely to jeopardize.
Habitat Conclusion	Conclusion of consultation for critical habitat: AM= Destruction or adverse modification; NM=No destruction or adverse modification.

RPAs	Summary of reasonable and prudent alternatives for jeopardy or adverse modification biological opinions.
Take Type	Type of incidental take being allowed from the pop-up menu: Individuals or Habitat.
Take Level	Level of take being anticipated (with rpa implemented) and time period covered.
RPMs	Summary of reasonable and prudent measures for incidental take.
Terms	Enter summary of terms and conditions of incidental take.
Report	Report required (Yes or No).
Report Frequency	How frequently must the action agency report?
Report Due	Date report is due to the Service.
Conservation Recommendations	Summary of conservation recommendations.
Follow-up	Summary of any follow-up evaluation.
Contact	Name and telephone number of the individual who authored the consultation.
Notes	Notes on the consultation.

APPENDIX A - REGULATIONS RELATING TO CONSULTATION

Interagency Cooperation - 50 CFR Part 402: June 3, 1986

Incidental Take of Endangered, Threatened and Other Depleted Marine Mammals - 50 CFR Parts 18, 228 and 402: September 29, 1989

[Note: These regulations are not available in electronic format.]

federal register

Tuesday
June 3, 1986

Part II

Department of the Interior

Fish and Wildlife Service

Department of Commerce

National Oceanic and Atmospheric Administration

50 CFR Part 402

Interagency Cooperation—Endangered Species Act of 1973, as Amended; Final Rule

DEPARTMENT OF THE INTERIOR

Fish and Wildlife Service

DEPARTMENT OF COMMERCE

National Oceanic and Atmospheric Administration

50 CFR Part 402

Interagency Cooperation—Endangered Species Act of 1973, as Amended; Final Rule

AGENCIES: Fish and Wildlife Service, Interior; National Marine Fisheries Service, National Oceanic and Atmospheric Administration, Commerce.

ACTION: Final rule.

SUMMARY: This final rulemaking establishes the procedural regulations governing interagency cooperation under section 7 of the Endangered Species Act of 1973, as amended (the "Act"). The Act requires Federal agencies, in consultation with and with the assistance of the Secretaries of the Interior and Commerce, to insure that their actions are not likely to jeopardize the continued existence of endangered or threatened species or result in the destruction or adverse modification of the critical habitat of such species. The Endangered Species Act Amendments of 1978, 1979, and 1982 (the "Amendments") changed the consultation requirements of section 7. This final rulemaking amends the existing rules governing section 7 consultation by implementing the changes required by the Amendments and by incorporating other procedural changes designed to improve interagency cooperation.

EFFECTIVE DATE: July 3, 1986.

FOR FURTHER INFORMATION CONTACT: Marvin E. Moriarty, Acting Chief, Office of Endangered Species, U.S. Fish and Wildlife Service, Department of the Interior, Washington, D.C. 20240 (703–235–2771); or Charles Karnella, Protected Species Division, Office of Protected Species and Habitat Conservation, National Marine Fisheries Service, National Oceanic and Atmospheric Administration, Department of Commerce, Washington, D.C. 20235 (202–634–7461).

SUPPLEMENTARY INFORMATION:

Background

On January 4, 1978, the Department of the Interior, through the United States Fish and Wildlife Service (FWS), and the Department of Commerce, through the National Marine Fisheries Service (NMFS), established procedures for the Act's consultation process by implementing the interagency cooperation requirements of section 7 (50 CFR Part 402, "1978 rule"). The consultation process is designed to assist Federal agencies in complying with the requirements of section 7 and provides such agencies with advice and guidance from the Secretary on whether an action complies with the substantive requirements of section 7.

The Secretaries of the Interior and Commerce (the "Secretary") share responsibilities for conducting consultations pursuant to section 7 of the Act. Generally, marine species are under the jurisdiction of the Secretary of Commerce and all other species are under the jurisdiction of the Secretary of the Interior. Authority to conduct consultations has been delegated by the Secretary of the Interior to the Director of the FWS and by the Secretary of Commerce to the Assistant Administrator for Fisheries, NMFS, National Oceanic and Atmospheric Administration.

Section 7(a)(1) of the Act authorizes Federal agencies, in consultation with and with the assistance of the Secretary of the Interior or Commerce, depending on the species involved, to utilize their resources in furtherance of the purposes of the Act by carrying out programs for the conservation of endangered species and threatened species ("listed species") listed pursuant to section 4 of the Act.

Section 7(a)(2) of the Act requires Federal agencies, in consultation with and with the assistance of the Secretary, to insure that any action authorized, funded, or carried out by such agency is not likely to jeopardize the continued existence of any listed species or result in the destruction or adverse modification of habitat of such species which has been designated as critical ("critical habitat"). Although Federal agency authority and responsibility under section 7 have remained virtually intact from the 1973 Act, the Amendments made significant procedural changes in the section 7 consultation procedures.

The 1978 Amendments formalized the process for the issuance of the Secretary's opinion ("biological opinions"), and required that the opinion include "reasonable and prudent alternatives" in cases where the proposed Federal action, in the opinion of the Secretary, would jeopardize the continued existence of a listed species or result in the destruction or adverse modification of its critical habitat. The 1978 Amendments also added section 7(c), requiring the preparation of biological assessments in appropriate instances. section 7(d) of the Act, also added by the 1978 Amendments, prohibits a Federal agency or any involved permit or license applicant, after initiation of consultation, from making an irreversible or irretrievable commitment of resources which would foreclose the adoption of any reasonable and prudent alternatives.

Perhaps the most significant part of the 1978 Amendments was the creation of the Endangered Species Committee, which is authorized to grant exemptions from the requirements of section 7(a)(2) in appropriate cases. Regulations governing the submission of exemption applications and consideration of such applications by the Endangered Species Committee are presently codified at 50 CFR Parts 450–453. Although this final rule on consultation procedures does not deal directly with exemptions, good faith adherence to the consultation requirements of section 7 is a statutory prerequisite for entry into the exemption process.

The 1978 Amendments slightly altered the Federal agency's substantive obligation under section 7(a)(2) from insuring that its action "does not jeopardize" listed species or adversely modify the critical habitat of such species to insuring that its action "is not likely to jeopardize" such species or critical habitat. Congress expressly provided that the consultation and resultant biological opinion be based upon the "best scientific and commercial data available." These changes made the consultation process more flexible and established a reasonable information standard to be followed by the NMFS and FWS (the "Service") and other Federal agencies. The 1978 Amendments added a requirement that all Federal agencies confer with the Secretary on all actions that are likely to jeopardize the continued existence of proposed species or result in the destruction or adverse modification of proposed critical habitat.

The 1982 Amendments also established several new processes under section 7. First, a new subsection 7(b)(4) allows for the issuance of an "incidental take statement" along with a biological opinion. This "incidental take statement" operates to exempt the Federal agency and any permit or license applicant involved from the section 9 "taking" prohibitions under the Act *if* the subsequent implementation of the action is consistent with the terms and conditions of the incidental take statement.

Second, the 1982 Amendments provide an opportunity for permit or license applicant involvement in all

phases of the consultation procedures. A prospective permit or license applicant may request Federal agencies to initiate consultation in advance of filing for any needed license or permit. If they have reason to believe that their proposed actions may affect listed species or critical habitat. This new provision, under section 7(a)(3), for "early consultation" allows a prospective applicant the opportunity to discover, and attempt to resolve, potential endangered or threatened species conflicts early in the planning stage of the proposed action—a time at which alterations in project plans could involve much less expense and delay.

Further involvement of the applicant in the consultation procedures is provided by the requirement that the applicant be involved in time extensions. Congress amended section 7(c) to require the Federal agency to give written notice to the applicant explaining why any extension of the biological assessment deadline is needed. If formal consultation under section 7(a)(2) is extended by the Service and the Federal agency for up to 60 days, the Service must provide the applicant with a written explanation of the reasons for extension. Any extension past 60 days must be approved by the applicant. Clearly, the permit or license applicant plays an active role in the consultation process. The final rule recognizes this increased role of the applicant while retaining the requirement that formal communications flow between the Federal agency and the Service during the consultation process.

In order to implement these Amendments to section 7 and to otherwise improve the interagency cooperation process, the Service published a proposed rule on June 28, 1983 (48 FR 29990–30004). Although the Service originally specified a 60-day comment period for these revised section 7 regulations, the comment period was extended until September 30, 1983. The Service received approximately 70 comments from other Federal agencies, State governmental agencies, private organizations, and other individuals and entities on the proposed rule.

After careful consideration of these comments, the Service has modified the regulations to clarify the consultation process and to improve the overall organization of the regulations. These technical changes are more fully explained in the section-by-section analysis below and were made to accommodate concerns raised in the public comments.

General Comments

The majority of the comments received on the proposed rule focused on particular regulatory provisions or concepts. These specific comments are discussed in the section-by-section analysis. However, several commenters expressed general concerns with the proposed rule or addressed matters that went beyond the scope of the proposal.

These general comments ranged from praise for the comprehensiveness of the proposal to criticism for the proposal's alleged failure to require the level of analysis and protection mandated by the Act. The Service believes that this final rule properly and accurately implements the Amendments to the Act and affords the protection mandated by section 7.

The House of Representatives Committee on Merchant Marine and Fisheries ("House Committee"), which oversees the implementation of the Act, submitted comments on the proposed rule. The Committee commended the Service in its efforts to translate complex legislation into agency policy and noted specific areas that it believed did not conform to the legislative intent. These matters have been clarified in the final rule.

One commenter was concerned that the proposed rule confused the informal (nonmandatory) consultation components with the formal (required) components of the consultation process. To clarify this matter, the Service has distinguished optional procedures from required procedures in the final rule. For example, the conference procedures (§ 402.10) are required for Federal actions that are likely to jeopardize proposed species or proposed critical habitat and the formal consultation procedures (§ 402.14) are required for actions that may affect listed species or critical habitat. Additionally, biological assessments (§ 402.12) are required for "major construction activities." Early consultation (§ 402.11) and informal consultation (§ 402.13) are optional procedures and are clearly designated as such in the final rule.

Concerned about increased paperwork burdens and potential time commitments resulting from the proposal, one commenter complained that the proposed rule is burdensome, unnecessary, and unacceptable. The commenter noted that additional protection for listed species or their habitat would not result from these alleged increases in administrative burdens, and it urged that currently used processes be maintained. The Service emphasizes that the proposal was not intended to increase in any way the paperwork burden of Federal agencies or any other participant in the consultation process. Moreover, the purpose of the proposal was to implement the Amendments to the Act in such a way as to streamline the consultation process while maintaining the protections afforded species under section 7. The concern of the commenter has been addressed to the extent possible by the Service's effort to clarify the consultation process in this final rule. Because section 7 imposes certain requirements on Federal agencies, any burdens recognized in this final rule are a creature of statutory law as implemented by these regulations.

Two commenters asserted that the Act protects habitat only when it is designated as the critical habitat of a listed species and, therefore, the Service must identify areas of critical habitat for all listed species to assure adequate protection. It is true that the Service has not designated critical habitat for all listed species. The Service has consistently taken the position that it is not prudent to designate critical habitat for a species if to do so would increase the risk that the species might be taken or would otherwise not benefit the species. *See* 50 CFR 424.12(a). However, the commenters ignore the fact that section 7 protections attach to both designated critical habitat and to each individual of a listed species within the jurisdiction of the United States or on the high seas. An action could jeopardize the continued existence of a listed species through the destruction or adverse modification of its habitat, regardless of whether that habitat has been designated as "critical habitat." Thus, the failure of the Service to designate critical habitat for a given species does not automatically mean that its habitat is without protection.

Two States commented that Federal agencies charged with implementing the Act should recognize and cooperate with the States in resolving water resource issues within the context of section 7. Consistent with the Department's "good neighbor" policy, one commenter encouraged the Service to actively include affected States in a consultation process. The Service intends to cooperate with all State and local agencies to resolve water resource issues consistent with the requirements of the Act. The Service stands ready to receive any and all comments, data, or other input from any affected States that are interested in a particular section 7 consultation. However, consultation takes place between the Service, the Federal agency and, where applicable, Federal permit or license applicant.

Several commenters stated that the proposal goes beyond the scope of the Act, thereby placing unjustifiable burdens on applicants and Federal agencies. They claimed that the rules would usurp Federal agency authority. One commenter questioned the ultimate authority of the Service to issue binding procedural regulations under section 7. In no way does the Service intend to use the consultation procedures of section 7 to establish substantive policy for Federal agencies. The Service performs strictly an advisory function under section 7 by consulting with other Federal agencies to identify and help resolve conflicts between listed species and their critical habitat and proposed actions. As part of its role, the Service issues biological opinions to assist the Federal agencies in conforming their proposed actions to the requirements of section 7. However, the Federal agency makes the ultimate decision as to whether its proposed action will satisfy the requirements of section 7(a)(2). The Service recognizes that the Federal agency has the primary responsibility for implementing section 7's substantive command, and the final rule does not usurp that function. The Service is satisfied that the final rule is within the scope of the authority provided in the Act.

Moreover, the Service is responsible for interpreting section 7 and for establishing a consultation process that is both uniform and consistent with statutory requirements. This issue was addressed in the preamble to the 1978 rule:

> The FWS and NMFS are authorized under the Act to issue such regulations as they deem appropriate for the conservation of listed species. The two Services believe that these procedural regulations promote the conservation of listed species by implementing a uniform general framework as the starting point for consultation. Once the mandatory consultation has taken place, however, the ultimate responsibility for determining agency action in light of section 7 still rests with the particular Federal agency that was engaged in consultation. In this fashion, a standardized consultation process is established which preserves ultimate agency administrative control over its activities or programs.

43 FR 870, 871 (Jan. 4, 1978). These procedural regulations do not dictate results but prescribe a process by which the Service will consult in keeping with the Act.

Several commenters stated that Congress did not intend that the Service interpret or implement section 7, and believed that the Service should recast the regulations as "nonbinding guidelines" that would govern only the Service's role in consultation. The Service notes that Congress reviewed with approval the section 7 regulations issued on January 4, 1978, when deliberating over the 1978 Amendments to the Act. *See* H.R. Conf. Rep. No. 1804, 95th Cong., 2d Sess. 18 (1978). Also, the Service was urged by the House Committee, through its comments on the proposed rule, to press forward with the issuance of this final rule. The Service is satisfied that it has ample authority and legislative mandate to issue this rule, and believes that uniform consultation standards and procedures are necessary to meet its obligations under section 7. However, the Service is aware that some Federal programs may require a modified consultation process, and therefore the Service has provided for the issuance of counterpart regulations under § 402.04.

Several general comments were received regarding programmatic adjustments and coordination. One commenter suggested that the Service maintain cumulative summaries of consultation activities in the Washington Office. The Service maintains copies of all biological opinions and monitors the issuance of biological opinions in an effort to ensure consistency and accuracy of findings. The Service submits that current review mechanisms are adequate and that, although the maintenance of cumulative consultation summaries might be useful, the increased costs are not justified.

Another commenter urged increased public participation in the consultation process, including: (1) Public notice of each request for consultation; (2) public notice of the agenda for each consultation; (3) public notice of consultation results; (4) public comment periods; and, (5) prescribed rights to appeal by the public. Nothing in section 7 authorizes or requires the Service to provide for public involvement (other than that of the applicant) in the "interagency" consultation process. Moreover, due to the statutory time constraints imposed on the consultation procedures, it would not be practicable to implement such detailed public participation measures. Public participation may be provided within the Federal agency's decisionmaking process. However, that is a function of the agency's regulations or substantive legislation and not an issue to be raised in the context of consultation.

Finally, several questions were raised as to what rules will apply to pending consultations once the final rule becomes effective. The Service does not anticipate any dramatic change in procedure or additional burdens on Federal agencies because the statutory changes to section 7 have been in effect throughout the development of the final rule. When this rule becomes effective, all pending and future consultations must comply with the requirements of these regulations. The Service will cooperate with the Federal agencies and any applicants to ensure that there are no undue delays in ongoing consultations.

Section-by-Section Analysis

The following portion of the preamble explains the final rule, covering the substantive issues of each section, noteworthy modifications from the proposed rule, significant changes from the 1978 rule, and responses to public comments. To assist the reader, Table 1 presents a citation to each subsection of the proposed rule with appropriate cross-references to the location of that provision in the final rule and in the 1978 rule.

TABLE 1.—CROSS-REFERENCE OF SECTION 7 REGULATORY PROVISIONS: PROPOSAL—FINAL—1978 RULE

Proposed	Final	1978 Rule
§ 402.01 Purpose and scope.	§ 402.01 Purpose and scope.	§ 402.01
§ 402.02 Definitions.	§ 402.02 Definitions.	§ 402.02 Definitions.
Action.	"Action."	"Action."
"Action area."	"Action area."	"Action area."
"Adverse effect."	"Adverse effect."	"Adverse effect."
"Applicant."	"Applicant."	"Applicant."
"Biological assessment."	"Biological assessment."	"Biological assessment."
"Biological opinion."	"Biological opinion."	"Biological opinion."
"Conference."	"Conference."	"Conference."
"Conserve."	"Conserve."	"Conserve."
"Conservation recommendations."	"Conservation recommendations."	"Conservation recommendations."
"Cumulative effects."	"Cumulative effects."	"Cumulative effects."
"Critical habitat."	"Critical habitat."	"Critical habitat." § 402.02
	"Destruction or adverse modification."	"Destruction or adverse modification."
	"Director."	
	"Effects of the action."	
	"Environmental baseline."	
	"Formal consultation."	
	"Incidental take."	
	"Indirect effects."	
	"Interested person."	
	"Jeopardize the continued existence of."	
	"Listed species."	
	"Reasonable and prudent alternatives."	
	"Reasonable and prudent measures."	
	"Recovery."	
	"Service."	
	"Species."	
	"Terms and conditions."	
	"Writing."	

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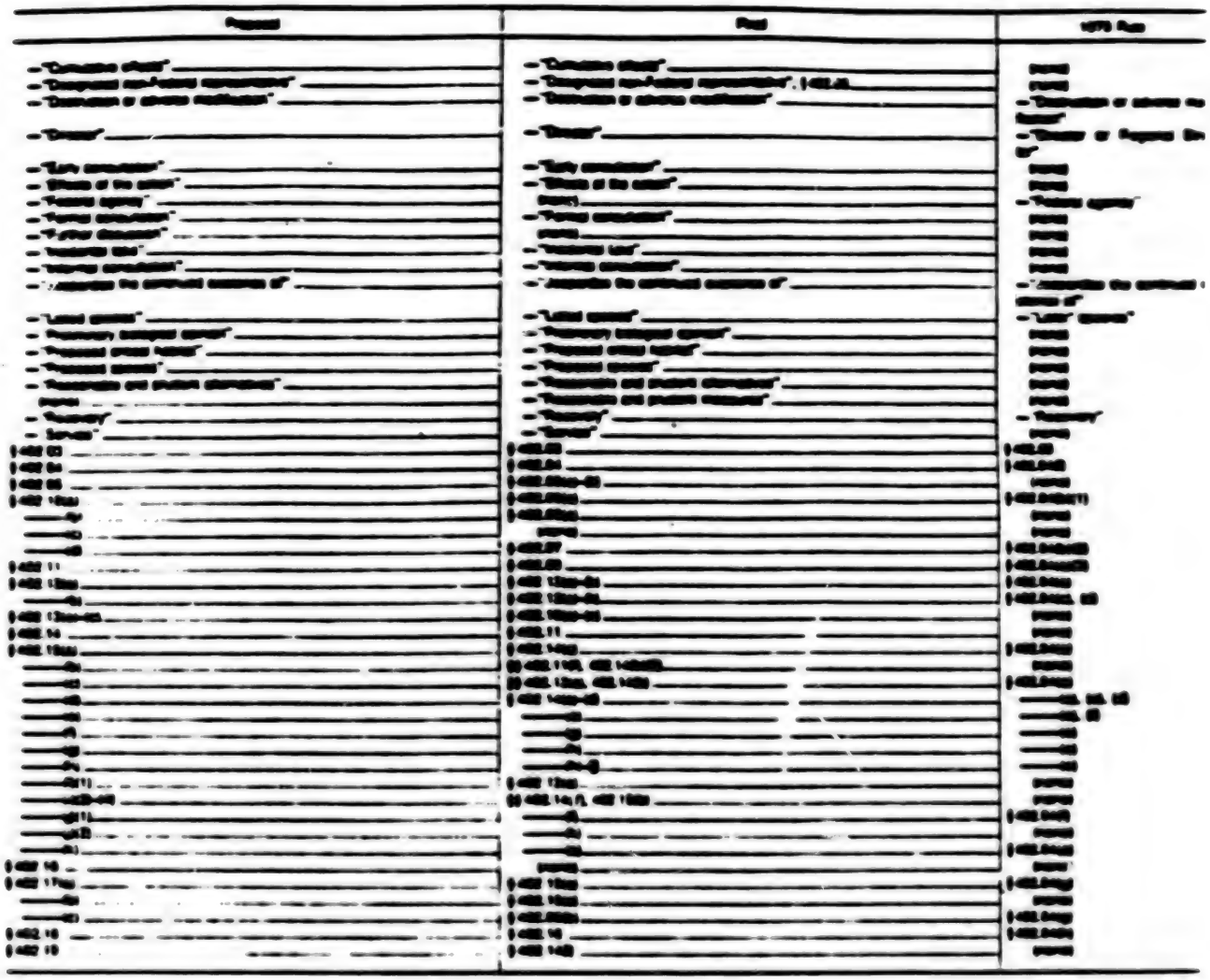
TABLE 1.—CROSS-REFERENCE OF SECTION 7 REGULATORY PROVISIONS: PROPOSAL—FINAL—1978 RULE—Continued



Subpart A—General

Section 402.01 Scope.

This section describes the purpose and scope of these regulations. Section 402.01 of the proposed rule contained an introductory paragraph and five subsections that were largely repetitive of other sections of the rule. These repetitive passages have been deleted from the final rule, and minor editorial corrections have been made.

Several commenters noted that, although § 402.01 acknowledges the language of section 7(a)(1) of the Act, no guidance is provided to enable Federal agencies to meet their conservation responsibilities under the Act. Claiming that the rules are silent as to Federal agency management programs required for the recovery of listed species, one commenter advised the Service to add a statement in the rule that would insure that Federal agencies address recovery as well as detrimental effects through consultation. According to another commenter, this statement may include a request that Federal agencies issue policies and procedures to implement their authority under section 7(a)(1).

The Service notes that it is beyond the scope of these regulations to address how other Federal agencies should implement and exercise their authority to carry out conservation programs for listed species under section 7(a)(1). However, the Service stands ready to assist any Federal agency in developing and carrying out conservation programs. The Service cautions that all Federal actions including "conservation programs" are subject to the consultation requirements of section 7(a)(2) if they "may affect" listed species or their critical habitats. If the Service agrees, through informal consultation, that the action is not likely to adversely affect the species, then formal consultation is not required [see § 402.13(a)–(b)]. Each Federal agency h the responsibility to implement its authority under section 7(a)(1). Furthe any conservation program must comp with applicable permit requirements t the extent that such actions involve t taking of listed species. "Take," as defined in the Act, means to harass, harm, pursue, hunt, shoot, wound, kill trap, capture, or collect, or to attempt engage in any such conduct.

The 1978 rule extended the scope o section 7 beyond the territorial limits the United States to the high seas and foreign countries. The proposed rule c back the scope of section 7 to the Uni States, its territorial sea, and the outer continental shelf, because of the apparent domestic orientation of the consultation and exemption processe resulting from the Amendments, and because of the potential for interfere with the sovereignty of foreign natio

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Several commenters asserted that the rules should continue to have extraterritorial effect. The scope of these regulations has been enlarged to cover Federal actions on the high seas but has not been expanded to include foreign countries. The Service finds that, because it already has jurisdiction under section 9(a)(1)(C) of the Act to regulate the taking of a listed fish or wildlife species on the high seas by all persons subject to the jurisdiction of the United States, concomitant jurisdiction under section 7 is implicit from Congressional concern that compliance with a section 7 incidental take statement not result in a taking violation under section 9(a)(1)(C), as provided in section 7(o)(2).

Although consultations on Federal actions in foreign countries will not be conducted under this rule, the Service maintains its strong commitment to the preservation of species and habitat worldwide. The Service will continue to list species which are found outside of United States jurisdiction when they are determined to be endangered or threatened.

Furthermore, Congress, in the International Environment Protection Act of 1983, 22 U.S.C. 2151q, made a finding that "the extinction of animal and plant species is an irreparable loss with potentially serious environmental and economic consequences for developing and developed countries alike." Accordingly, it places the preservation of species "through limitations on the pollution of natural ecosystems, and through the protection of wildlife habitats" as an "important objective of the United States development assistance." In furtherance of this policy, an Interagency Task Force was established to develop a national strategy for the protection and conservation of biological diversity in developing countries. The task force did not specifically recommend that international assistance activities be subject to consultation requirements, but did cite section 7(a)(2) in recommending that Federal agencies "should continue to adopt policies withholding support for certain types of projects that degrade or destroy fragile or protected lands." Until enacted by Congress, however, the recommendations of the task force will not be implemented in these regulations for the reasons stated above.

One commenter urged the Service to change the standard for initiating a section 7(a)(4) conference from "likely to jeopardize" to "would adversely affect." The regulation tracks the statute, and the Service lacks the authority to make the requested change. The same commenter noted that the section 7(d) sentence referred to a "would avoid jeopardizing" standard. (Emphasis theirs.) Again, the Service adopts the regulation as in keeping with the statutory standard.

Another commenter stated that biological opinions need only be required after formal consultation under section 7(a)(2) of the Act and that this should be clarified in the rule. The Service disagrees because the statute requires that a "written statement" containing the Secretary's opinion be issued after the conclusion of both early and formal consultation. The rule has been amended slightly to clarify this requirement.

The commenter also requested that the sentence in proposed § 402.01(d) dealing with section 7(d) be amended by adding "measures" after the phrase "reasonable and prudent alternative[s]" to bring the regulation in line with the statute. The Service declines to make this change because it would tend to confuse "reasonable and prudent alternatives" that are included in jeopardy biological opinions with "reasonable and prudent measures" that are included in an incidental take statement under section 7(b)(4) of the Act. The proposed language describing the section 7(d) prohibition accurately implements the Act and is adopted in this final rule.

Section 402.02 Definitions.

This section sets out definitions of terms that are used throughout these regulations. As noted in Table 1, many definitions have been added to those included in the 1978 rule. Only comments which specifically addressed the definitions used in these regulations are discussed in this section. These terms are further discussed as they pertain to the consultation procedures in the appropriate, subsequent sections.

A definition of "Act" has been added to the final rule. It refers to the Endangered Species Act of 1973, as amended (16 U.S.C. 1531 *et seq.*).

The definition of "action" parallels the former definition of "activities or programs," a term that predated the Amendments. Several changes have been made to the definition of "action" to accommodate public comments: First, the definition is expanded to cover activities occurring on the high seas. (*See* § 402.01 segment of the Preamble.) Second, the phrase "actions that are intended to conserve listed species or their habitat" was restored from the 1978 rule because of the decision to require Service review of all Federal actions that may affect listed species or their critical habitat. (*See* § 402.14 segment of the Preamble.) The Service declines to define further or to delete the reference to actions that "indirectly cause modifications to the land, water, or air" in this definition. The concept of indirect effects is adequately addressed in the discussion of "cumulative effects" and "effects of the action."

The definition of "action area" is adopted from the proposed rule. Several commenters criticized the vagueness or apparent expansiveness caused by the reference to indirect effects in this definition. The definitions of "cumulative effects" and "effects of the action" further clarify the scope of "indirect effects."

The Service is not able to define specific spatial and temporal limits for the concept of indirect effects that would satisfy every conceivable situation, and believes that sufficient understanding of the term exists so that confusion will not occur. "Action area" is not limited to the immediate area involved in a Federal action.

"Applicant," an abbreviated term including all permit or license applicants, was defined in the proposed rule because of the increased role of permit or license applicants in the consultation process. Although the Act defines "permit or license applicant" in section 3(12), the Act's definition is of limited use in the consultation context because it focuses on the exemption process under section 7. The definition in the proposed rule broadly defines "applicant" as "any person who requires formal approval or authorization from a Federal agency as a prerequisite to conduct the action." Thus, applicants would include those seeking permits, licenses, leases, letters of authorization, and any other form of authorization or approval issued by a Federal agency as a prerequisite for carrying out the action.

One commenter suggested that the definition of applicant be amended to allow prospective permit applicants to participate in section 7 consultations involving the promulgation of regulations governing permit issuance. The applicant (or prospective applicant) is involved in the consultation process as a result of a specific permit or license application. The applicant may provide input regarding its concerns in the Federal agency's rulemaking process through the Administrative Procedure Act, 5 U.S.C. 551 *et seq.* Further, a prospective applicant could request early consultation through the Federal agency under § 402.11 of this rule on its prospective application during the course of agency rulemaking, if it desires early notice of potential conflicts and if it meets the requirements of these

regulations. This would involve interaction with the Service, but it would be limited in scope to the prospective application for the permit at issue, not a general consultation on the pending rulemaking. In response to another comment, the Service takes the position that it will not expand "applicant" to include those seeking funding from Federal agencies, unless the request for funding is coupled with a requirement that the person obtain Federal approval or authorization as a prerequisite for carrying out the action for which funding is sought. Finally, one commenter asked that the scope of the definition be expanded to include corporations, Federal agencies, and all other legal entities. The Service believes that the use of the word "person" in the definition satisfies the commenter's concern because of the broad definition of that term in section 3(13) of the Act. To clarify this point, the Service added a reference to the Act's definition of "person" in the definition of "applicant" in the final rule.

The definition of "biological assessment" in the final rule, derived from §§ 402.02 and 402.12(b)(4)(iii) of the proposed rule, clarifies that the assessment must include an evaluation of potential impacts. One commenter criticized the "vagueness" of the definition of "biological assessment" in the proposed rule, stating that it was unclear as to how a Federal agency would determine which species or critical habitat may be in the action area and how the agency would evaluate potential effects. The Service believes that this definition is adequate and that the process-oriented format in § 402.12 of the regulations adequately explains the scope and procedure of the biological assessment requirement.

The proposed definition of "biological opinion" has been adopted in these final rules. A biological opinion is the document that states the Service's opinion as to whether or not the Federal action is likely to jeopardize the continued existence of listed species or result in the destruction or adverse modification of critical habitat. One commenter suggested a third possible conclusion for biological opinions: "insufficient information to issue an opinion." The commenter argued that such a conclusion would eliminate the risk that the Service takes when issuing an opinion based on arguably inadequate data. The Service declines to add this third option. The legislative history of the Act is clear in requiring the Service to make a decision on the issue of likely jeopardy at the conclusion of formal consultation. The Service will not sidestep this obligation, but instead will conclude either "jeopardy" or "no jeopardy" based on the best available data.

The definition of "conference" has been adopted as proposed. One commenter suggested that the conference not include recommendations to minimize or avoid adverse effects since they are not required by section 7(a)(4) of the Act. The commenter believed that such recommendations might result in legal action if not adopted. The Service, however, believes it has the responsibility not only to identify impacts but also to identify measures that would reduce those impacts.

The definition of "conservation" contained in the proposed rule was derived from the Act's definition in section 3(3). One commenter, characterizing the Service's interpretation of "conservation" as opposing the purposes of the Act and potentially encouraging the "further decline" of listed species, urged the Service to adopt the strict language of the statutory definition. The Service's definition in the proposed rule in no way discouraged recovery. In fact, the proposed definition tracked the statute except for its interpretation of "the point at which the measures provided pursuant to this Act are no longer necessary" as being equivalent to "the point at which [the species] may be removed from the Lists . . . ." The basic goal of the Act is to recover listed species through conservation measures. Bringing a species to the point at which the Act's protective measures are no longer necessary is the same as bringing the species to the point at which delisting is appropriate. However, to avoid any misunderstanding, the Service has deleted the definition from the final rule and will rely solely on the definition contained in section 3(3) of the Act. The Service declines specifically to include habitat modification (improvement or restoration), "off-site mitigation," captive propagation, and species reintroduction in the list of conservation methods and procedures, as suggested by certain commenters. Such activities are already adequately provided for in the Act's definition.

The term "conservation recommendations" was introduced in the proposed rule and explains the Service's role in helping agencies meet their section 7(a)(1) responsibilities. Several commenters feared that the Service would employ conservation recommendations to require Federal agencies to reformulate their actions that had received "no jeopardy" biological opinions. This is not the purpose of conservation recommendations. They are nonbinding suggestions that a Federal agency may elect to implement in its proposed action. These recommendations should be consistent with the general scope, magnitude, and duration of a Federal action that is not likely to jeopardize a listed species or destroy or adversely modify its critical habitat. The Service, in answering the concerns noted above, is satisfied that it has clarified its position and that the regulatory definition should not be deleted. The Service has chosen to retain this definition with limited, technical changes because it believes that the opportunity to provide conservation recommendations, including minor design modifications, may minimize possible adverse effects and may avoid future section 7 conflicts for subsequent Federal actions in the same action area.

One commenter confused "conservation recommendations" with "reasonable and prudent alternatives" and believed that recommendations to *reduce* adverse impacts would violate section 7(a)(2), absent the granting of exemption. The obligation of Federal agencies under section 7(a)(2) is to insure that the actions they authorize, fund, or carry out are not likely to *jeopardize* listed species or destroy or adversely modify their critical habitat. A showing of "adverse effect" does not necessarily violate section 7(a)(2), because the jeopardy standard is the ultimate barrier through which Federal agencies may not pass in conducting their actions. "Reasonable and prudent alternatives" represent avenues of fulfilling the action without violating jeopardy standard. "Conservation recommendations" involve voluntary measures that the Federal agency has the discretion to undertake to avoid or reduce adverse effects of a proposed action that otherwise complies with provisions of section 7(a)(2).

The definition of "consultation process" has been deleted from the final rule because it tended to confuse the statutory requirements and optional processes and because it added little to the public's understanding of the process. The definition in the proposed rule could have led persons to believe that early consultation and informal consultation are required, sequential steps of the overall consultation process. As discussed above, the only required components of the consultation process are a "conference" for proposed species, a "formal consultation" for listed species, and a biological assessment for "major construction activities."

The "critical habitat" definition contained in the proposed rule only referred to those sections of 50 CFR Parts 17 and 226 that contain the lists of those areas so designated. The mechanics of the designation process are more properly considered under the section 4 regulations (50 CFR Part 424). For purposes of determining whether any of their actions is likely to destroy or adversely modify critical habitat, Federal agencies involved in section 7 consultations need only be aware of those areas that have been designated by the Service as critical habitat. Two commenters requested that a definition of critical habitat be included in the final rule. The Service notes that the requested definition is contained in the Act and need not be repeated here.

"Cumulative effects" and "effects of the action" are defined in § 402.02 of the final regulations. Under § 402.14(g) (3) and (4) of the final rule, the Service will consider both the "effects of the action" subject to consultation and "cumulative effects" of other activities in determining whether the action is likely to jeopardize the continued existence of a listed species or result in the destruction or adverse modification of critical habitat.

In determining the "effects of the action," the Director first will evaluate the status of the species or critical habitat at issue. This will involve consideration of the present environment in which the species or critical habitat exists, as well as the environment that will exist when the action is completed, in terms of the totality of factors affecting the species or critical habitat. The evaluation will serve as the baseline for determining the effects of the action on the species or critical habitat. The specific factors that form the environmental baseline are given in the definition of "effects of the action," as requested by some commenters.

"Effects of the action" include the direct and indirect effects of the action that is subject to consultation.

"Indirect effects" are those that are caused by the action and are later in time but are still reasonably certain to occur. They include the effects on listed species or critical habitat of future activities that are induced by the action subject to consultation and that occur after that action is completed. In *National Wildlife Federation v. Coleman*, 529 F.2d 359 (5th Cir. 1976), the Court of Appeals for the Fifth Circuit found that "indirect effects" which can be expected to result must be considered under section 7 of the Act. In that case, the court enjoined completion of a highway because the Department of Transportation failed to consider the effects to the endangered sandhill crane from future private development that would result from construction of the highway. The Service will consider the effects to listed species from such future activities that are reasonably certain to occur under the analysis of "indirect effects." The Service's approach will be consistent with *National Wildlife Federation v. Coleman*, and the Service declines to narrow the scope of its review (as requested by one commenter) in light of existing case law.

Effects of the action also include direct and indirect effects of actions that are interrelated or interdependent with the proposal under consideration. Interrelated actions are those that are part of a larger action and depend on the larger action for their justification; interdependent actions are those that have no significant independent utility apart from the action that is under consideration. As noted by one commenter, the "but for" test should be used to assess whether an activity is interrelated with or interdependent to the proposed action.

One commenter urged the Service to exclude Federal actions that have completed consultation from the environmental baseline unless it can be shown that the actions are reasonably certain to occur. The Service declines to adopt this suggestion. In issuing its biological opinion on an action, the Service's finding under section 7(a)(2) entails an assessment of the degree of impact that action will have on a listed species. Once evaluated, that degree of impact is factored into all future section 7 consultations conducted in the area. These impacts will continue to be considered as part of the environmental baseline unless the Service receives notice from the Federal agency that the proposed action will not be implemented, or unless the biological opinion on the proposed action is no longer valid because reinitiation of consultation is required.

In response to one comment, the Service notes that Federal actions that have proceeded through early consultation and that have received "no jeopardy" preliminary biological opinions should be factored into the environmental baseline. These actions, to be eligible for early consultation, had to be nonspeculative, feasible actions, and, because the preliminary biological opinion can later be confirmed as a final biological opinion, this initial review and conclusion by the Service must be considered in other section 7 consultations.

The term "cumulative effects" means those effects on the species caused by other projects and activities unrelated to the action under consultation that the Service will consider in formulating its biological opinion on the subject action. One commenter opposed the proposed definition of cumulative effects by arguing that the Act does not require an analysis of cumulative effects in a section 7 consultation. Citing section 7(c), the commenter noted that biological assessments may be limited to an examination of effects of "such action" on listed species. The commenter urged the Service to strike cumulative effects analysis from this rule because few Federal agencies have the capability to recognize or assess cumulative effects of State or private actions contemporaneously with conducting section 7 consultation. According to the commenter, the Service, as the expert on current status of listed species, should keep watch on those State and private activities that come on line in a particular action area. The Service responds that a Federal agency, when evaluating the environmental impacts of a proposed action, must comply with NEPA. Since this compliance includes an analysis of cumulative effects, the Service believes that it is the Federal agency's responsibility to develop this information. The cumulative effects analysis conducted in compliance with the broad definition under NEPA may be submitted to the Service by the Federal agency when initiating formal consultation. The Service can use this analysis and apply its narrower definition of cumulative effects when analyzing whether a proposed action, along with cumulative effects, violates section 7(a)(2) of the Act.

Other commenters, while not opposing the applicability of cumulative effects analysis to section 7 consultations, believed that the proposed scope of "cumulative effects" and "effects of the action" were too narrow. These commenters generally suggested that cumulative effects should include the effects of all reasonably foreseeable future Federal, State, and private actions. They stated that this scope would be more in line with that mandated under NEPA and argued that any lesser review could detrimentally affect endangered species. The commenters adamantly opposed any limitation on the foresight employed by the Service or Federal agencies that they believed would result from the proposal's construction of cumulative effects.

Section 7 consultation will analyze whether the "effects of the action" on listed species, plus any additional

cumulative effects of State and private actions which are reasonably certain to occur in the action area, are likely to jeopardize the continued existence of that species. Based on this analysis, the Federal agency determines whether it can proceed without exceeding the jeopardy standard. If the jeopardy standard is exceeded, the proposed Federal action cannot proceed without an exemption. This is a substantive prohibition that applies to the Federal action involved in the consultation. In contrast, NEPA is procedural in nature, rather than substantive, which would warrant a more expanded review of cumulative effects. Otherwise, in a particular situation, the jeopardy prohibition could operate to block "nonjeopardy" actions because future, speculative effects occurring after the Federal action is over might, on a cumulative basis, jeopardize a listed species. Congress did not intend that Federal actions be precluded by such speculative actions.

Future Federal actions proposed for the same area would have to be separately evaluated under section 7 and could not occur unless they were able, in their own right, to avoid jeopardizing the continued existence of the affected species or destroying or adversely modifying critical habitat. Since all future Federal actions will at some point be subject to the section 7 consultation process pursuant to these regulations, their effects on a particular species will be considered at that time and will not be included in the cumulative effects analysis. However, those future State or private actions (*i.e.*, no Federal agency involvement) that are "reasonably certain to occur" must be factored into section 7(a)(2) evaluations. The Service agrees that cumulative effects that are reasonably certain to occur will be considered in determining the likelihood of jeopardy. The final rule is amended accordingly, to clarify the duty to consider cumulative effects.

One commenter thought that the "reasonably certain to occur" standard was far too narrow and that it should be amended to cover actions where proposals have been made, and implementation schedules have been established. This suggestion would open the door for speculative actions to be factored into the "cumulative effects" analysis, adding needless complexity into the consultation process and threatening potential Federal actions which pose minimal adverse impacts of their own with possible "jeopardy" opinions due to speculative, State or private projects that may never be implemented. For State and private actions to be considered in the cumulative effects analysis, there must exist more than a mere possibility that the action may proceed. On the other hand, "reasonably certain to occur" does not mean that there is a guarantee that an action will occur. The Federal agency and the Service will consider the cumulative effects of those actions that are likely to occur, bearing in mind the economic, administrative, or legal hurdles which remain to be cleared. The Service declines to alter its "cumulative effects" definition to include State or private actions that are not likely to occur.

One issue was raised concerning the application of cumulative effects analysis to water projects. A commenter contended that State and private projects that possess senior water rights under State water law and that can "reasonably be expected to occur" concurrently with the Federal action should be considered as cumulative effects. The Service notes that any State or private project (*i.e.*, no Federal agency involvement) that is reasonably certain to occur must be considered during the analysis of cumulative effects. Further, the Service believes that Federal actions, whether authorized, funded, or carried out by Federal agencies, that possess senior water rights should be considered while analyzing the effects of the action. In order to determine the effects of the action when a water project is the subject of consultation in a State which follows the prior appropriation doctrine, the project's operation plan should indicate the priority of the project's water rights under State law and account for the future effects of senior conditional water rights.

On a related matter, the Associate Solicitor's opinion on the scope of cumulative effects cited in the proposed rule provided, in part, that only those effects of other projects that are reasonably certain to occur *prior* to the completion of the Federal action subject to consultation under section 7(a)(2) should be considered during formal consultation. This statement has been interpreted by some to exclude from cumulative effects analysis those future State and private actions that, while "reasonably certain to occur," would not be completed *before* the completion of the Federal action subject to consultation. Such an interpretation places undue emphasis on the use of the word "prior" while ignoring the central concept that the Associate Solicitor's opinion intended to project: that a proposed State or private activity be "reasonably certain to occur" in order to be taken into account during cumulative impact analyses. If such a State or private project satisfies the "reasonable certainty" test, then it should be considered in the cumulative impact analysis, even if it would go on line sometime after completion of the federally authorized, funded, or carried out project which was the subject of consultation. To the extent that the Associate Solicitor's opinion created the opposite impression, the Service takes this opportunity to clarify this point.

Moreover, as suggested by some commenters, and for the reasons outlined above, the Service has deleted its reference to the Interior Department position on "cumulative effects" in 88 I.D. 903 (1981) in the definition section. The Service disagrees with the commenter who stated that the citation to the legal opinion in the proposed definition denied the public meaningful comment on these regulations. The policy was widely known, and it was explained in the preamble to the proposed rule. The Associate Solicitor's opinion on "cumulative effects" is published in Interior Decisions, a publication available to the general public. Finally, the opinion does not represent a policy change subject to Administrative Procedure Act (APA) informal rulemaking proceedings. It represented Interior's legal interpretation of the scope of "cumulative effects" under section 7, adopted and published in 1981 in keeping with APA requirements. 5 U.S.C. 552(a). Therefore, no reproposal is needed on this issue.

The definition of "designated non-Federal representative" is adopted from the proposal in part. First, in response to a comment, the Service explains that the non-Federal representative may conduct informal consultations (§ 402.13) and/or prepare biological assessments (§ 402.12). However, Federal agencies cannot delegate their role in initiating formal consultation, a conference, or early consultation. The second sentence of the proposed definition has been deleted, but a new § 402.08 has been added to further explain the role of the designated non-Federal representative.

The proposed definitions of "destruction or adverse modification" and "jeopardize the continued existence of" received a lot of attention from commenters. Both definitions contained, as did the 1978 rule, the phrase "survival and recovery." The final rule retains the language of the proposed definitions, except for the changes noted below. Also connected with these terms is the definition of "recovery." The "recovery" of a listed species means that the status

of the species has improved to the point at which it may be removed from the Lists of Endangered and Threatened Wildlife and Plants.

The principal controversy involving the "jeopardy" and "destruction or adverse modification" definitions was that, under the proposed rule, to find that an action is likely to jeopardize a listed species or result in the destruction or adverse modification of critical habitat, the Service must identify detrimental impacts to "both the survival and recovery" of the listed species. The conjunction "and" was used in the 1978 rule's definitions of these phrases, but the word "both" was added by the proposed rule to emphasize that, except in exceptional circumstances, injury to recovery alone would not warrant the issuance of a "jeopardy" biological opinion. The Service adopts these definitions substantially without change from the proposed rule; this does not represent a change in policy, as one commenter charged, because the Service has internally interpreted the "jeopardy" standard as requiring detrimental impacts to the continued existence of a species under a joint survival and recovery concept. Other Federal agencies are assured that the same "jeopardy" standard under which their actions have been evaluated in the past will be continued under this final rule.

Several commenters urged the Service to strike the "and" and insert "or" in the definitions of "jeopardy" and "destruction or adverse modification." They argued that injury to recovery for an already depleted species would require the issuance of a jeopardy opinion. They also remarked that the Service's position disregarded the conservation requirements of the Act, failed to adequately protect critical habitat, operated to weaken or nullify recovery efforts, and otherwise violated the purposes and policies of the Act.

These commenters misconstrued the Service's role in conducting consultations under section 7(a)(2) of the Act. The purpose of consultation is to identify conflicts between proposed Federal actions and the "jeopardy" standard of section 7(a)(2). The "continued existence" of the species is the key to the jeopardy standard, placing an emphasis on injury to a species' "survival." However, significant impairment of recovery efforts or other adverse effects which rise to the level of "jeopardizing" the "continued existence" of a listed species can also be the basis for issuing a "jeopardy" opinion. The Service acknowledges that, in many cases, the extreme threats faced by some listed species will make the difference between injury to "survival" and to "recovery" virtually zero.

One commenter disagreed that actions adversely affecting survival of a species will also always adversely affect its recovery. The commenter did not cite examples where an action that jeopardized "survival" of a species would not jeopardize its "recovery." The Service is not aware of any examples and believes that it would be very difficult to recover a species whose survival had been placed in jeopardy. The very concept of "jeopardy" is that a Federal agency should not authorize, fund, or carry out an action that would injure a listed species' chances for survival to the point that recovery is not attainable. If survival is jeopardized, recovery is also jeopardized. As noted above, though, these concepts are generally considered together in analyzing effects, and it is difficult to draw clear-cut distinctions.

The concept of "survival" is discussed above, but is not defined in the Act or in these regulations. Two commenters felt that "survival" should be defined in the regulations, and one urged the Service to adopt the following specific definition:

> "Survival" for a species means retention of a sufficient number of individuals and/or populations with necessary habitat to insure that the species will keep its integrity in the face of genetic recombination and known environmental fluctuations.

The Service agrees with the criteria set out in the above definition, but declines to adopt a regulatory definition for "survival" because this concept varies widely among listed species. The Service will apply the statutory standard of jeopardy to the continued existence of a species on a case-by-case basis, taking into account the particular needs of and the severity and immediacy of threats posed to a listed species. The Service is not attempting to predetermine the results of any future consultations by announcing these interpretations of the "jeopardy" standard, but instead is emphasizing what "jeopardy" is and how it should be applied in the section 7(a)(2) process.

One commenter urged the Service to go further and forbid any Federal action to proceed, regardless of a "no jeopardy" finding, if the proposed action would adversely affect the recovery of a listed species. Numerous commenters cited sections 2(c)(1), 3(3), and 7(a)(1) of the Act as authority for the Service to ban Federal agency actions that "violate the requirement to conserve endangered species."

The commenters misinterpret the statutory changes which the Amendments have made to section 7, and they misconstrue court decisions which have noted the apparent "heightened" responsibility of the Secretary. The Service will undertake programs for the conservation of listed species and will consult with other Federal agencies attempting to do the same. The Service will not, nor does it have the authority to, mandate how or when other Federal agencies are to implement their responsibilities under section 7(a)(1), nor is the Service authorized to issue a biological opinion under section 7(a)(1) of the Act. Section 7(a)(1) has a limited purpose under the Act: to authorize Federal agencies to factor endangered species conservation into their planning processes, regardless of other statutory directives.

In contrast, section 7(a)(2) contains the mandatory "jeopardy" standard. The prohibitory features of section 7, and the exemption process added by the 1978 Amendments, focus on the provisions of section 7(a)(2). Although there is no express legislative history directly weighing and comparing the relative strengths of section 7(a)(1) with 7(a)(2), there can be no doubt that Congress considered the jeopardy standard of section 7(a)(2) as being the substantive cornerstone of section 7:

> The term "is likely to jeopardize" is used because the *fundamental* obligation of section 7(a) of the act is that Federal agencies insure their actions do not jeopardize the continued existence of an endangered or threatened species.

S. Rep. No. 151, 96th Cong., 1st Sess. 4 (1979) (emphasis added). Congress intended that the "jeopardy" standard be the ultimate barrier past which Federal actions may not proceed, absent the issuance of an exemption. The commenters' argument would require Federal actions to halt if they failed to conserve listed species, a result clearly not intended by Congress. Congress intended that actions that do not violate section 7(a)(2), or actions receiving an exemption from the requirements of that subsection, be allowed to proceed.

Commenters argued that it would be a violation of section 7(a)(1) for the Service to issue a "no jeopardy" biological opinion for a proposed Federal action that would have an adverse effect on the recovery of a listed species. As previously stated, the Service lacks authority to issue biological opinions under that subsection, and the Act does not mandate particular actions to be taken by Federal agencies to implement 7(a)(1). Furthermore, adverse effects not

rising to the level of "jeopardizing the continued existence" of a listed species cannot be the basis for issuing a jeopardy opinion.

The Service disputes two commenters' assertions that "the Service now proposes to allow the 'continued existence' of a listed species to reach a state of likely jeopardy." The Service has followed and will continue to follow the policy of strictly applying the jeopardy standard of section 7(a)(2) in the consultation process. The Service has not and will not relax the statutory standard.

One commenter stated that limiting the definition of "destruction or adverse modification" to critical habitat is illogical. This limitation is mandated by the strict language of section 7(a)(2) and cannot be altered by the Service, although habitat destruction can be the basis for a jeopardy opinion in appropriate cases.

Another commenter requested that examples be given of actions that might indirectly alter critical habitat. The Service responds with the following examples of indirect alteration of critical habitat (which is not intended as an exclusive list): ground water pumping that occurs on land adjacent to the critical habitat area, but nevertheless diminishes essential ground water levels within the critical habitat; air pollution created by an action not occurring directly on the critical habitat area that causes a deterioration of essential air quality levels in the critical habitat; contamination of water supply within the critical habitat caused by release of toxic substances outside of the critical habitat area; etc.

In the definition of "jeopardize the continued existence of," one commenter suggested the word "could" be substituted for "would" in the phrase "would be expected, directly or indirectly, to reduce appreciably the likelihood of . . . the survival and recovery of listed species . . . ." Such a change would be an unwarranted deviation from the language of the 1978 rule in light of subsequent Amendments to the Act. The Service retains the substance of the proposed language, but does delete the phrase "or otherwise adversely affecting the species" because, as several commenters suggested, the phrase is confusing and adds nothing to the definition.

In response to several comments, the Service has modified the definition of "recovery" to make it clear that recovery is not attained until the threats to the species as analyzed under section 4(a)(1) of the Act have been removed. The protective measures provided for listed species under the Act are no longer needed if endangered or threatened status is no longer applicable to a species under section 4(a)(1).

The definition of "Director" has been modified by the addition of the phrase "or his authorized representative" after "the FWS regional director" and "Assistant Administrator for Fisheries" to accommodate present and future delegations of authority to carry out certain consultation responsibilities. Although the Minerals Management Service requested that all Outer Continental Shelf (OCS) section 7 biological opinions issued by the FWS be signed by the Washington Office, the authority to sign such opinions will remain with the regional offices because they have been staffed specifically to conduct all interagency consultations and to sign the resulting biological opinions.

The term "early consultation" was included in the proposed rule pursuant to the provisions of section 7(a)(3). This section authorizes the Service to consult with Federal agencies at the request of prospective applicants, prior to the submission of the permit or license application to that Federal agency. The definition has been modified to reference the appropriate section of the Act.

One commenter requested that, instead of using the term "early consultation," the Service refer to this process as "consultation on behalf of prospective applicants." The commenter was concerned that, by calling this pre-application process "early consultation," the Service would fail to alert Federal agencies and applicants of the need to determine impacts to endangered or threatened species early in the planning stages of all of their actions, regardless of whether the consultation is early, informal, or formal. The Service retains the label "early consultation" due to its convenience, its frequent use in the committee reports on the 1982 Amendments, and its common acceptance within and outside the Service. The Service believes that the language provided in § 402.14(a), advising Federal agencies to review their actions at the earliest possible time, provides adequate safeguards to address the commenters' concerns.

The definition of "Federal agency" has been deleted since it is defined in section 3(7) of the Act. The Service declines to expand the statutory definition to accommodate one commenter's concern. The statutory definition adequately provides notice that all departments, agencies, and instrumentalities of the United States come within the scope of section 7. The Service will not interpret this term further in the final rule.

The definition of "formal consultation" has been modified to specify that it is the consultation required under section 7(a)(2) of the Act. Other minor, technical changes have also been made. The phrase "after it has been determined, through informal consultation with the Service, that its action may adversely affect listed species or critical habitat" has been deleted from the proposed definition because, as recommended by some commenters, informal consultation is strictly an optional process. Although the Federal agency may elect to enter into informal consultation to determine if formal consultation is required, the Federal agency can initiate formal consultation any time that it determines its action may affect listed species or critical habitat.

"Further discussion" was an optional process included in the proposed rule, provided the Federal agency and any applicant the opportunity to continue consultation after the issuance of a biological opinion in order to discuss with the Service any reasonable and prudent alternatives and any conservation recommendations. Recommendations and alternatives could be refined or developed during these discussions, and consultation would terminate with the Federal agency's written notice of its final decision on the action. Because of concerns expressed by commenters, the provision contained in proposed § 402.[illegible] has been deleted from the final rule.

Although several commenters supported this provision, many opposed further discussion contending that it is unnecessary, that all reviews and discussions should occur prior to the issuance of the biological opinion, that extends consultation beyond the statutory time limits, and that it lacks statutory authority. Although the process was optional, some commenters believed that there was an implication that the Federal agency or applicant would have a duty to engage in further discussion.

Although further discussion has been deleted, the Service is available to discuss the biological opinion, any reasonable and prudent alternatives, and any conservation recommendations with the Federal agency and any applicant on an informal basis. If revisions to the opinion are necessary, consultation can be reinitiated and a revised opinion issued.

"Incidental take" has been clarified in the final rule as those takes that result from, but are not the purpose of,

carrying out an otherwise lawful activity conducted by the Federal agency or the applicant. As requested by one commenter, the Service explains that otherwise lawful activities are those actions that meet all State and Federal legal requirements except for the prohibition against taking in section 9 of the Act. The Service believes that the definition, as clarified in the final rule, is adequate.

The definition of "informal consultation" has been clarified in the final rule to indicate that it is an optional process that includes all discussions, correspondence, etc., between the Service, Federal agency, and designated non-Federal representative prior to formal consultation. To address one commenter's concerns, "if required" has been included after "formal consultation" to clarify that formal consultation is not always required after informal consultation. Through informal consultation, a Federal agency may determine that formal consultation is not required.

The definition of "listed species" is adopted as proposed. Contrary to the concern of one commenter, aquatic invertebrates are not excluded from this definition, because all listed species in 50 CFR 17.11–17.12 are specifically included.

The definition of "major construction activity" was included in the definition of biological assessment in the proposed rule and is adopted substantially as proposed. As suggested by many commenters, it has been made a separate definition. Whether a Federal action is a major construction activity, as defined in these regulations, is the standard used for determining whether a Federal agency must prepare a biological assessment. A "major construction activity" is defined as a construction project (or other undertaking having similar physical impacts) that is a major Federal action significantly affecting the quality of the human environment for purposes of NEPA. The term encompasses dams, buildings, pipelines, roads, water resource developments, channel improvements, and other such undertakings which significantly modify the physical environment.

A vast array of comments were received concerning the scope of a major construction activity that requires the preparation of a biological assessment. Several commenters noted that only major Federal actions requiring the preparation of an environmental impact statement (EIS) pursuant to NEPA should require the preparation of a biological assessment under section 7(c) of the Act. Other commenters argued that assessments can only be required for major Federal actions involving construction activities, and suggested that the phrase "or other undertakings having similar physical impacts" be eliminated from the definition. Four commenters thought that the standard in the proposed rule was too narrow, because the limitation to major Federal actions, and/or the limitation to construction projects and other undertakings having similar physical impacts, were arbitrary and without legal basis. The Service has adopted the definition of major construction activity as proposed for the reasons set out below.

The legislative history of section 7(c) of the Act plainly focused the mandatory duty to prepare biological assessments on "major Federal actions . . . designed primarily to result in the building or erection of dams, buildings, pipelines and the like." H.R. Conf. Rep. No. 697, *supra*. The two-pronged regulatory test adopted in this rule—major Federal action *and* construction project (or other undertaking having *similar* physical impacts)—clearly tracks the quoted language from the Conference Report to the 1978 Amendments. The Service will not require biological assessments for projects that are not major Federal actions for purposes of NEPA. Further, the Service will not require biological assessments for actions that do not involve construction or activities having physical impacts similar to construction, such as dredging, blasting, etc. This limitation derives support from the 1978 Conference Report reference to actions designed *primarily to result* in the building or erection of various projects. Those other "potentially destructive activities," H.R. Rep. No. 1625, *supra*, having physical impacts similar to construction projects, will require the preparation of an assessment [illegible] only if they are major Federal actions for purposes of NEPA.

The Service declines to limit the scope of the definition of a major construction activity to major Federal actions involving construction projects, because other potentially destructive activities that are major Federal actions may have similar physical impacts and should be included. The Service is confident that the courts will be able to apply this standard consistent with the Act and the legislative history.

Contrary to the belief of one commenter, the Service has not abrogated its authority under section 7(c). That commenter urged the Service to change this rule by requiring biological assessments "for actions that, taking into consideration cumulative effects, may be 'potentially destructive.'" Citing a February 1980 legal opinion issued by the Assistant Solicitor for Fish and Wildlife, Department of the Interior, the commenter noted that cumulative effects may trigger the requirement that an assessment be prepared, although the Service must defer to the Federal agency's decision on whether a major Federal action exists. Contending that Congress would have used the word "shall" instead of "may" in the last sentence of section 7(c)(1) if it had intended that assessments be required only for major Federal actions for purposes of NEPA, the commenter argued that the definition of "major construction activity" should be expanded:

> "Major Construction activity" means any planned, temporary, or permanent physical modification to the environment. Examples of such projects include but are not limited to, dredging, drilling, filling, mining, site preparation, road construction, the erection of structures such as dams and buildings, or any other potentially destructive activities.

The commenter's suggested language goes well beyond the above-cited legislative history of the Act which clearly limited the biological assessment requirement to major Federal actions within the meaning of NEPA that are construction projects or that involve similar physical impacts. Further, the legal opinion of the Assistant Solicitor cited by the commenter does not support the commenter's argument because that opinion dealt with cumulative effects of a proposed *construction* project and a basic rule of NEPA case law that cumulative impacts of an action can trigger the requirement that an EIS be prepared. Thus, the basic elements of this rule's requirements—major Federal action (*e.g.*, EIS, or the functional equivalent, required) *and* construction project (or activity involving similar physical impacts)—were assumed to be appropriate standards by the Assistant Solicitor. The use of the word "may" instead of "shall" in section 7(c) means nothing more than Congressional intent that the duty to coordinate these review processes is discretionary with the Federal agency.

As requested by one commenter, the final definition clearly states that an action must be both a major Federal action for purposes of NEPA *and* a construction project (or other activity involving similar impacts). Therefore, it plainly follows that, although dams, pipelines, etc. are construction activities, a biological assessment is not

required unless the action is also a major Federal action.

Two commenters argued that OCS leasing, exploration, and development/production activities should be exempt from the section 7(c) requirement because such an analysis is presently covered by NEPA compliance as addressed in the Outer Continental Shelf Lands Act. Other commenters agreed with the Service that biological assessments would be required for development/production activities on the OCS, and, generally, would not be required for leasing and exploration activities that do not involve a significant modification of the physical environment. The Service adopts its position as proposed, because no exemption exists under section 7(c) if a biological assessment is required for an action. In some instances, OCS exploration activities may require the preparation of a biological assessment; *e.g.*, major Federal action involving exploration through construction of artificial gravel islands. However, in most cases major Federal exploration activities on the OCS will involve the drilling of test wells, actions that will not require the preparation of assessments.

The definition of "preliminary biological opinion" is adopted as proposed.

The definition of "proposed critical habitat" is adopted as proposed with the addition of the phrase "or revised" after "designated." The commenter that suggested this correction accurately noted that proposals may be made to designate or revise critical habitat under section 4 of the Act.

The definition of "proposed species" is adopted as proposed.

"Reasonable and prudent alternatives" is defined in the final rule. Section 7(b) of the Act requires the Service to include reasonable and prudent alternatives, if any, in a "jeopardy" biological opinion. An alternative is considered reasonable and prudent only if it can be implemented by the Federal agency and any applicant in a manner consistent with the intended purpose of the action, and if the Director believes it would avoid the likelihood of jeopardizing the continued existence of listed species or resulting in the destruction or adverse modification of critical habitat of such species. Further, the Service should be mindful of the limits of a Federal agency's jurisdiction and authority when prescribing a reasonable and prudent alternative. An alternative, to be reasonable and prudent, should be formulated in such a way that it can be implemented by a Federal agency consistent with the scope of its legal authority and jurisdiction. However, the Service notes that a Federal agency's responsibility under section 7(a)(2) permeates the full range of discretionary authority held by that agency; *i.e.*, the Service can specify a reasonable and prudent alternative that involves the maximum exercise of Federal agency authority when to do so is necessary, in the opinion of the Service, to avoid jeopardy. The Service recognizes that economic and technological feasibility are factors to be used in developing reasonable and prudent alternatives, as requested by one commenter. The definition of "reasonable and prudent alternatives" has been amended to reflect these considerations. If there are no alternatives that meet the definition of "reasonable and prudent alternatives," the Service will issue a "jeopardy" biological opinion without alternatives.

Two commenters stated that reasonable and prudent alternatives should include mitigation measures designed to reduce adverse effects, *i.e.*, conservation recommendations. One of these commenters urged the Service to limit the scope of recommended alternatives to those "consistent with the scope, magnitude, and duration of the project as well as the extent of its adverse effects." First, because there is a distinction between "reasonable and prudent alternatives" (that satisfy section 7(a)(2)) and "conservation recommendations" (that are authorized by section 7(a)(1)), the Service declines to include conservation measures within the scope of the definition. Second, the Service agrees that reasonable and prudent alternatives should be consistent with the intended purpose of the action and should therefore be economically and technologically feasible, but the Service cannot limit its range of choices to the criteria suggested by the commenter. Reasonable and prudent alternatives must cover the full gamut of design changes that are economically and technologically feasible for an action, independent of who is sponsoring the action.

Two commenters asked that "reasonable and prudent measures" be defined, and the Service has inserted a definition in the final rule. This addition clarifies the distinction between "reasonable and prudent alternatives" included in a "jeopardy" biological opinion and "reasonable and prudent measures" provided in an incidental take statement. The Service agrees with several commenters that reasonable and prudent measures are not the same as reasonable and prudent alternatives. Substantial design and routing changes—appropriate only for alternatives to avoid jeopardy—are inappropriate in the context of incidental take statements because the action already complies with section 7(a)(2). The commenter that advocated an "alternatives" approach for reasonable and prudent measures misapplied the legislative history of the 1982 Amendments. Reasonable and prudent measures were intended to minimize the level of incidental taking, but Congress also intended that the action go forward essentially as planned. Therefore, the Service believes that they should be minor changes that do not alter the basic design, location, duration, or timing of the action. The section 7 obligations of Federal agencies are not expanded by the application of reasonable and prudent measures, which strictly govern the scope of the section 9 exemption for incidental takings.

The definition of "Service" is adopted as proposed.

Section 402.03 Applicability.

This section, which explains the applicability of section 7, implicitly covers Federal activities within the territorial jurisdiction of the United States and upon the high seas as a result of the definition of "action" in § 402.02. The explanation for the scope of the term "action" is provided in the discussion under § 402.01 above.

Section 402.04 Counterpart Regulations.

The Service has retained the counterpart regulations section of the 1978 rule as the new § 402.04 that authorizes the drafting of joint counterpart regulations by Federal agencies and the Service. "These counterpart regulations would allow individual Federal agencies to 'fine tune' the general consultation framework to reflect their particular program responsibilities and obligations." 43 FR 870, 871 (Jan. 4, 1978).

Counterpart regulations must be published first as proposed rules with a minimum 60-day public comment period. Such counterpart regulations must retain the overall degree of protection afforded listed species required by the Act and these regulations. Changes in the general consultation process must be designed to enhance its efficiency without eliminating ultimate Federal agency responsibility for compliance with section 7. As long as the general consultation process is used as a starting point, Federal agencies can anticipate little difficulty in securing approval of the Service for counterpart regulations.

One Federal agency commented that the counterpart regulation process is a time-consuming alternative. The Service admits that informal rulemaking takes time and effort, but believes that the "fine tuning" that could occur through the development of counterpart regulations might, in the long run, provide a solid return in time and resources saved through the use of a more compatible consultation procedure.

Section 402.05 Emergencies.

Section 402.05 provides a modified consultation procedure for the Service to respond to emergency situations. This provision applies to situations involving acts of God, casualties, disasters, national defense or security emergencies (added to the rule in response to public comments), etc.

Upon request by the Federal agency, the Service may carry out consultation through procedures other than those provided under these regulations, as long as such emergency procedures are consistent with sections 7(a)–(d) of the Act. This allows, for example, consultation through informal means (*e.g.*, a telephone call) and, therefore, rapid responses to emergency situations.

Several commenters suggested that specific procedures should be set out to provide guidance to Federal agencies facing emergency situations. One commenter suggested that consultation could be initiated informally, such as through a telephone call, and the Service could then communicate its information and recommendations over the telephone. Because of the severe time constraints inherent in an emergency, this informal approach is the method the Service anticipates will be used by a Federal agency to conduct a consultation for a *bona fide* emergency. One commenter felt that minimum requirements should include "documentation of the nature of the emergency and justification for an expedited consultation." The Service agrees and has required, in a new paragraph (b) to this section, that the nature of the emergency and the justification for using an expedited process be documented and forwarded to the Service. However, the Service has not required that this be done during the emergency or expedited consultation, as this may not always be possible. The new paragraph (b) requires that the Federal agency conduct an "after the fact" consultation. The Service will evaluate the information submitted by the Federal agency, *i.e.*, the nature of the emergency actions, justification for the expedited consultation, and an evaluation of the impacts to listed species and critical habitat, and issue a biological opinion including the information and recommendations given during the emergency consultation. This will serve not only to document fully the consultation, but may assist the Federal agency in responding to similar emergencies.

One commenter argued that, when dealing with a fire, flood, earthquake, or storm, there is not enough time or opportunity for a Federal agency to undertake consultation through an alternate process determined by the Director to be consistent with section 7. The Service notes that the utmost flexibility is needed to handle the most extreme emergencies and believes that the informal process outlined in this section would satisfy the commenter's concern for the availability of prompt consultation and decisionmaking in emergency situations.

The Service further recognizes that it is sometimes necessary to take immediate steps to contain, limit, or alleviate an emergency in order to protect health, safety, and welfare prior to initiating any form of consultation. However, the Service would like to stress the fact that its early involvement is important in order to take advantage of its expertise in minimizing the effects of emergency response activities on endangered and threatened species. Federal agencies must exercise discretion when responding to an emergency as to when to consult with the Service. This will depend on the nature of the emergency and the actions that are immediately required. The Federal agency should contact the Service as soon as practicable, keeping in mind the informal nature of emergency consultation and Service expertise in minimizing the impacts of emergency response activities on endangered and threatened species.

Section 402.06 Coordination with Other Environmental Reviews.

This section on coordination with other environmental reviews contains paragraphs (a) and (b) of § 402.10 and paragraph (c) of § 402.17 of the proposed rule. The substance of these paragraphs has been adopted, but the format has been altered.

These regulations, following the 1978 rule, allow Federal agencies to coordinate their consultation, conference, and biological assessment responsibilities under the Act with the agency's responsibilities under other statutes such as NEPA (42 U.S.C. 4321 *et seq.*) or the Fish and Wildlife Coordination Act (FWCA, 16 U.S.C. 661 *et seq.*). The Service encourages Federal agencies to coordinate these responsibilities, but believes it is preferable to allow Federal agencies to do so in a manner that best conforms to their particular actions and which they believe is most efficient. Therefore, the sentences in the proposed § 402.10(b) stating that biological assessments *should* be incorporated into the documents required by other statutes (such as NEPA) have been dropped from the final rule.

Several commenters applauded these paragraphs because the coordination of environmental reviews would reduce duplication of paperwork and save time. One commenter requested guidance on how a NEPA review of endangered species issues should be conducted. The Service is not in a position to provide criteria that will ensure adequate NEPA compliance on endangered species issues. The Service suggests that the commenter contact the Council on Environmental Quality, the agency in charge of NEPA compliance, to obtain such information.

Another commenter expressed concern that, in simplifying the consultation process, safeguards should be used to avoid potential abuse and substantive problems. The commenter feared that, without safeguards, NEPA compliance might be construed as being less necessary on endangered species matters. The Service is also concerned that it retain sufficient review capability to identify potential conflicts between proposed Federal actions and listed species. Therefore, it has slightly altered its consultation procedures in this final rule to ensure that all Federal actions that "may affect" listed species receive some degree of review under informal or formal consultation.

The concluding sentences of paragraph (a) emphasize that although, for example, a biological assessment can be incorporated into an EIS, the procedures of these regulations also must be satisfied to ensure adequate and timely analyses during the section 7 consultation process. These sentences also express the intent of the Service to avoid a fragmented analysis of environmental concerns through the Service's direct efforts to provide a coordinated review. The Service declines to delete these sentences as requested by several commenters.

Under paragraph (b), the Service agrees with a comment that the biological opinion should be stated in the final environmental impact statement or environmental assessment. A statement of the opinion may be a summary of its findings and conclusio contrary to the fear of one commenter that the entire opinion must be repeated

in the text of the NEPA document. The Service does feel that the entire opinion should be attached as an exhibit to the NEPA document if completion time permits.

Section 402.07 Designation of Lead Agency.

This section, which governs the designation of a lead agency, is adopted from § 402.10(f) of the proposed rule. One commenter requested that the section be amended so that only the lead agency is required to notify the Director that it will be conducting consultation on behalf of itself and all other cooperating agencies. The Service has adopted this suggestion.

Section 402.08 Designation of Non-Federal Representative.

A new § 402.08 has been added to the final rule to clarify the role of the designated non-Federal representative and was derived from §§ 402.02 and 402.12(a) and (b)(3) of the proposed rule. Because the designated non-Federal representative may or may not be the applicant, there is a difference in the role the representative can play in the consultation. If the representative is not the applicant, the information-gathering functions, through informal consultation (§ 402.13) and/or through the preparation of a biological assessment (§ 402.12), is the full extent of its participation. However, if the representative is an applicant, its role in consultation is two-fold. As the representative, it may conduct the information-gathering functions identified above; as the applicant, it may continue its participation into formal consultation.

If an applicant is involved and does not desire to be the designated non-Federal representative, the Federal agency and the applicant must agree on the party to be designated. The Director shall be notified, in writing, if a non-Federal entity has been designated to represent the Federal agency for the informal consultation or biological assessment procedures.

One commenter stated that prior notice to the Director of the designation of a non-Federal representative is unnecessary. The Service disagrees because there is a legitimate need for it to be certain of the Federal agency's concurrence in the representation. However, the Service notes that there is a degree of flexibility here; *i.e.*, designation in advance for a continuous action or for a group of related actions is acceptable. In response to one comment, the Service agrees that the designated non-Federal representative may only submit a species list under the biological assessment procedures (§ 402.12) if the Federal agency has, previously to or simultaneously with this notice, provided its written designation to the Director.

Another commenter questioned the Service's authority to conduct informal consultations with non-Federal representatives in place of the Federal agencies. The Service acknowledges that the Federal agency must retain the responsibility to initiate formal consultation along with its ultimate responsibility to ensure that its actions are not likely to jeopardize listed species, but the designation of a representative by the Federal agency to conduct informal consultation does not lessen these responsibilities or eliminate the Federal agency's duty to review its actions. Instead, the designation of a representative allows the Federal agency to coordinate all of its environmental reviews, thereby saving time and resources to obtain a single, comprehensive analysis of the action and its potential impacts. The agency must still review the work product and independently reach its own conclusions and decisions. The representative does the ground work (data compilation and synthesis); the Federal agency cannot delegate its duty to review, analyze, and formally consult.

Concerned that a conflict of interest could exist if applicants were allowed to be designated as non-Federal representatives, one commenter cited 40 CFR 1506.5(c) (NEPA regulation) as authority for eliminating applicants from the field of potential representatives. The Service declines to make the suggested change for the following reason. Section 7(c)(2) itself recognizes that exemption applicants (including permit or license applicants) may prepare biological assessments in cooperation with the Service and under the supervision of the Federal agency. This express statutory opportunity for "interested parties" (as applicants would always be) to prepare biological assessments runs counter to the NEPA rule and shows the clear Congressional intent in favor of full applicant involvement in the section 7 process. Although applicants may fill the role of non-Federal representatives, the ultimate responsibility for compliance with section 7 remains with the Federal agency. In response to one commenter, the regulations have been changed to eliminate the requirement that the Federal agency "participate in the preparation" of the biological assessment. The Service believes that the Federal agency may fulfill its responsibilities by providing guidance and supervision, and by independently reviewing and evaluating the work product of the applicant. Responsibility for carrying out negotiations with the Service may not be delegated to the applicant/representative, as suggested by this commenter. In addition, Federal agencies cannot delegate their role in initiating formal consultation, conference, or early consultation.

Section 402.09 Irreversible and Irretrievable Commitment of Resources.

Section 7(d) of the Act provides that, after initiation of consultation required under section 7(a)(2), the Federal agency and any applicant shall make no irreversible or irretrievable commitment of resources with respect to the Federal action which has the effect of foreclosing the formulation or implementation of any reasonable and prudent alternatives that would avoid violation of section 7(a)(2). This prohibition does not apply to actions affecting proposed species or proposed critical habitat. This mandatory restriction on commitment of resources is set out in § 402.09 of the final rule (formerly § 402.11 of the proposal). In response to comments, the language of the proposed rule was corrected to conform more closely to section 7(d). Another commenter requested that the sentence dealing with section 7(d) be amended by adding "measures" after the phrase "reasonable and prudent alternative[s]" to bring the regulation in line with the statute. The Service declines to make this change because it would tend to confuse "reasonable and prudent alternatives" that are included in jeopardy biological opinions with "reasonable and prudent measures" that are included in an incidental take statement under section 7(b)(4) of the Act. The proposed language describing the section 7(d) prohibition accurately implements the Act and is adopted in this final rule.

The proposed rule addressed the duration of the section 7(d) prohibition as follows:

> This requirement exists until: a "no jeopardy" biological opinion is issued by the Service . . . , the Federal agency adopts reasonable and prudent alternatives, or an exemption is granted under section 7(h).

Proposed rule, 48 FR 29990, 30000 (June 29, 1983), *proposed to be codified at* 50 CFR 402.11. Several commenters asked for a clarification or expansion of the criteria that terminate section 7(d) restrictions. Noting that the Act is silent as to when the section 7(d) prohibition ceases, one commenter contended that the prohibition should end when consultation is terminated. Another commenter, concerned that the proposed language would deprive Federal

agencies of the responsibility and authority to determine compliance with section 7(a)(2), urged the addition of a fourth criterion that would terminate the section 7(d) prohibition if "the Federal agency determines that its proposed action will not jeopardize the continued existence of endangered and threatened species or adversely affect critical habitat." Another commenter went further and urged the Service to adopt other criteria where Federal agency compliance with section 7(a)(2) would remove the section 7(d) restriction. Two other commenters felt that the second criterion—adoption of reasonable and prudent alternatives—must be restricted to those recommended by the Service. They opposed allowing the Federal agency to formulate its own "reasonable and prudent alternatives" without Service approval in order to avoid the prohibition of section 7(d).

The commenters raise valid concerns that illustrate the need to reexamine the duration of the prohibition against the irreversible and irretrievable commitment of resources. First, the Service recognizes that, although its biological opinions issued by authority of section 7(b) are entitled to great deference, the ultimate decision of whether to proceed with an action in light of section 7 responsibilities rests with the Federal agency. The proposed language did preempt Federal agency discretion by placing an agency that disagreed with the conclusion of the Service's biological opinion in the awkward position of facing section 7(d) restrictions on its action, even though it had determined through its own analysis that the section 7(a)(2) standards were satisfied. Second, case law indicates that section 7(d)'s proscriptive force continues while Federal agency efforts to conform its action to the requirements of section 7(a)(2) are "ongoing." *See North Slope Borough* v. *Andrus*, 642 F.2d 589, 611 n.143 (D.C. Cir. 1980); *Conservation Law Foundation of New England, Inc.* v. *Andrus*, 623 F.2d 712, 714 n.1 (1st Cir. 1979). The final rule has been amended to provide that the section 7(d) prohibition is in force during consultation and continues until the requirements of section 7(a)(2) are satisfied.

Therefore, if a Federal agency receives a "no jeopardy" biological opinion from the Service or chooses any reasonable and prudent alternative recommended by the Service, the requirements of section 7(a)(2) are met and the section 7(d) prohibition expires. If the Federal agency disagrees with a "jeopardy" biological opinion or chooses an alternative not provided by the Service based on its own analysis, then the validity of the Federal agency's "no jeopardy" finding will decide whether section 7(a)(2) has been satisfied and whether section 7(d) no longer applies. If it is later determined that the finding is not valid, the Federal agency would be taking the risk of noncompliance with the Act.

Finally, one commenter asked that this section be amended to require Federal agencies to give written notice to the Service verifying that neither it nor any applicant involved has made any irreversible or irretrievable commitment of resources during consultation. The Act does not provide such authority, except arguably in the exemption process. A mandatory section 7(d) notice has not been adopted in this final rule regarding consultation procedures because section 7(d) is strictly prohibitory in nature and not consultative.

Subpart B—Consultation Procedures

There are five primary components within the section 7 consultation procedures—conference, early consultation, biological assessment, informal consultation, and formal consultation. Of these, only conference, formal consultation, and biological assessments may be required. Although a Federal agency may elect to use several of these procedures, they do not represent a mandatory, sequential process. As requested by one commenter, the following is a brief abstract of each component of the consultation process.

If a Federal agency determines that its action is likely to jeopardize the continued existence of any proposed species or result in the destruction or adverse modification of proposed critical habitat, the Federal agency is required to "confer" with the Service under § 402.10. The purpose of a conference is to identify and resolve potential conflicts between an action and proposed species or critical habitat. The Service will make advisory recommendations on ways to minimize or avoid adverse effects. If the proposed species or proposed critical habitat is subsequently listed or designated, respectively, then the Federal agency must consider whether formal consultation under § 402.14 is required.

"Early consultation" is an optional process that may be requested through the Federal agency by a prospective applicant to determine whether its proposed action is likely to jeopardize the continued existence of a listed species or result in the destruction or adverse modification of critical habitat. Early consultation occurs prior to a formal application for a Federal permit or license. Such early consultation is conducted between the Service and the Federal agency in cooperation with the prospective applicant. At the request of the prospective applicant, early consultation is initiated by the Federal agency responsible for issuing the permit or license and is generally conducted and concluded in the manner prescribed for "formal consultation." If the action is a "major construction activity," the biological assessment requirement of § 402.12 must be satisfied before early consultation is initiated. After concluding early consultation, the Service will deliver its preliminary biological opinion to the Federal agency and the prospective applicant.

After formal application is made for the permit or license but before its issuance, the Federal agency should submit to the Service a written request that the preliminary biological opinion be confirmed as a final biological opinion under section 7(a)(2). If the Service determines that no significant changes have occurred in either the proposed action or the information available since early consultation, no new impacts are anticipated, and no new species have been listed or critical habitat designated since early consultation, it will confirm that the preliminary biological opinion remains accurate and shall be treated as a final biological opinion issued under section 7(b) of the Act. Consultation will terminate in accordance with § 402.14(*l*). However, if the Service is unable to confirm the preliminary biological opinion due to any of the reasons outlined in § 402.11, formal consultation on that action must be initiated under § 402.14.

"Biological assessment" requirements apply to all major construction activities as defined in these regulations. Even if not required, Federal agencies may voluntarily prepare a biological assessment to assist them in fulfilling their section 7 responsibilities. Also, any person who wishes to apply for an exemption may voluntarily prepare such an assessment in cooperation with the Service and under the supervision of the appropriate Federal agency.

A biological assessment contains information concerning listed or proposed species or designated or proposed critical habitat that may be present in the action area and an evaluation of any potential effects of the action on such species and habitat. A biological assessment should be used in determining whether formal consultation or a conference is required.

"Informal consultation" includes all the contacts (discussions, correspondence, etc.) between the Federal agency or its designated non-Federal representative and the Service that take place prior to the initiation of any necessary formal consultation. Informal consultation may be used by the Federal agency in determining whether formal consultation under § 402.14 or a conference under § 402.10 is required.

"Formal consultation" is required under section 7(a)(2) of the Act. A Federal agency must initiate formal consultation if it determines that its action "may affect" any listed species or its critical habitat unless it determines through informal consultation or biological assessment procedures, with the written concurrence of the Service, that its action "is not likely to adversely affect" such species or habitat. If the action is a "major construction activity," the biological assessment requirement must be satisfied before formal consultation may begin. Formal consultation is concluded within 90 days or extended in accordance with the provisions of § 402.14. Within 45 days after concluding formal consultation, the Service will deliver its biological opinion stating whether or not the action is likely to jeopardize the continued existence of listed species or result in the destruction or adverse modification of critical habitat. If formal consultation results in a "jeopardy" biological opinion, reasonable and prudent alternatives, if any, will be included in the opinion.

These procedures are discussed more fully below, together with the sections governing post-consultation responsibilities of Federal agencies and the factors that require reinitiation of formal consultation. Specific public comments are treated on a section-by-section basis.

Section 402.10 Conference on Proposed Species or Proposed Critical Habitat.

The 1978 Amendments added the requirement in section 7(a)(4) that Federal agencies confer with the Service on any Federal action that is likely to jeopardize the continued existence of any *proposed* species or result in the destruction or adverse modification of *proposed* critical habitat. The purpose of this requirement is to identify and resolve potential conflicts between an action and proposed species or proposed critical habitat at an early point in the decisionmaking process. Conferences will be conducted on an informal basis between the Federal agency and the Service. The Service will make recommendations, if any, to minimize or avoid adverse effects of the action on proposed species or proposed critical habitat. These recommendations are advisory in nature, because the "jeopardy" prohibition of section 7(a)(2) does not apply until the species is listed or the critical habitat is designated. However, the Federal agency and any applicant should give serious consideration to implementing the recommendations since, if the species is later listed or critical habitat designated, the Federal agency must review its action, regardless of its stage of completion, to determine whether consultation is required. In certain instances the Federal agency and the Service may conduct the conference in such a thorough manner that it would satisfy the consultation requirements of section 7(a)(2) if the proposed listing or designation is subsequently completed.

The conference procedures are not repetitive of work performed in the preparation of a biological assessment, as suggested by three commenters. First, the conference requirement applies to all Federal actions, while the biological assessment requirement only applies to actions that are "major construction activities." Second, the conference requirement applies to proposed species and proposed critical habitat, whereas biological assessments are required only when listed species or critical habitat may be present in the action area (although proposed species or proposed critical habitat should be covered in the assessment if they also may be present in the action area). Thus, the conference process fills the need to alert Federal agencies of possible steps that the agency might take at an early stage to adjust their actions to avoid jeopardizing a proposed species. The Service strongly encourages the implementation of the recommendations so the action would not violate section 7(a)(2) if the species is listed or the critical habitat designated.

After reviewing a biological assessment or other available information, the Service may determine that a conference is required for the proposed species or proposed critical habitat. A sentence has been added to the new paragraph (b) of § 402.10 (proposed § 402.13(a)) to point out the Service's responsibility to request a Federal agency to confer after a review of available information. The last sentence of the proposed paragraph (a) has been deleted since the new § 402.08 clearly defines the role of the designated non-Federal representative. The Service declines to take the position that it can "require" the initiation of a conference, because the Federal agency bears the ultimate responsibility to assess the likelihood of jeopardy to proposed species by its actions. However, the Service will vigilantly review biological assessments and other available information and fulfill its duty to make Federal agencies aware of their responsibilities under the Act.

The Service emphasizes the need for Federal agencies to confer because such efforts may not only minimize or avoid injury to proposed species but might also prevent the halting of an action if the species is subsequently listed:

> Obviously, Federal agencies irreversibly committing resources and foreclosing alternatives to an action that is likely to jeopardize a proposed species do so with the risk that the species will eventually be formally listed and the prohibitions of section 7 will become applicable. The conferees do not believe that any Federal agency or permittee should make any irreversible or irretrievable commitments of resources for the purpose or with the intent of foreclosing otherwise reasonable alternatives or in order to secure an exemption pursuant to section 7(h).
>
> H.R. Conf. Rep. No. 697, 95th Cong., 1st Sess. 13 (1979).

There is no requirement that Federal agencies confer with the Service on species that are candidates for listing proposals. However, for the reasons identified by Congress in the Conference Report to the 1979 Amendments on proposed species, the Service encourages Federal agencies to confer informally on candidate species when deemed appropriate to avoid jeopardy and to avoid potential economic loss through project modification if the species is later listed.

Several specific changes were recommended for proposed paragraph (a) (paragraphs (a) and (b) in the final rule). One commenter felt that the reference to "potential endangered species conflicts" was too restrictive. The Service agrees that the proposed rule might have been construed so as to exclude threatened species. Therefore, the sentence has been adjusted to refer to all potential conflicts.

One commenter urged the Service to change the standard for initiating a section 7(a)(4) conference from "likely to jeopardize" to "would adversely affect." The regulation tracks the statute. The Service lacks the authority to make the requested change.

Several commenters urged the Service to make provisions for applicant involvement in the conference process. The Service agrees, and has added language in paragraphs (a), (c), and (e) of § 402.10 to ensure that applicants have an opportunity to participate in the

conference, and that they receive a copy of the conclusions documented by the Service.

Another commenter asked that time limits be established for the conference process. The Service declines to establish time limits for the conference requirement. The timing of the section 7(a)(4) process is, in part, dictated by the progress of the proposed rulemaking to list a species or to designate critical habitat. Regardless of any time limits that the Service could establish, the conference requirement expires and consultation is required if the listing or critical habitat designation becomes final. The Service finds no reason to impose rigid time frames for conferences.

Paragraph (c) defines the nature and content of the conference. Basically, a "conference" involves informal discussions on the identification and possible avoidance or minimization of potential adverse effects to proposed species or proposed critical habitat from a Federal action. The reference to "informal discussions" should not be confused with "informal consultation," which is a distinct, but optional, component of consultation.

The Service declines to modify paragraph (c) by changing "advisory" recommendations to "conservation" recommendations, as suggested. Such a change may confuse conference with formal consultation, the required procedure in which discretionary "conservation recommendations" may be given. The Service also declines to adopt suggested provisions that would (1) require advisory recommendations to be made in every conference, (2) force the Service to notify the Federal agency of the date on which a final decision will be made on a listing proposal, or (3) require the Service to initiate emergency rulemaking proceedings to list a species or designate critical habitat if the Federal action is likely to jeopardize the species. Although required, conference is an informal process that has no substantive force. To force every conference into a regimented structure would be counterproductive and contrary to the intent of the Act. When appropriate, the Service will make advisory recommendations on ways to avoid or minimize adverse effects to proposed species or proposed critical habitat. During the conference, the Service will apprise the Federal agency of the progress of the listing or critical habitat proposal and will attempt to notify the Federal agency when the listing or critical habitat proposal becomes final. Emergency rulemaking is provided for under section 4(b)(7) of the Act and will be used if appropriate under the circumstances.

One commenter suggested that the conference involve all of the steps of formal consultation, but on an informal basis so that if the listing becomes final, the conclusions and recommendations derived from the conference could be adopted as a final biological opinion. In some cases, a thorough, well-prepared conference might elucidate sufficient conclusions and recommendations to serve as the biological opinion, upon the final listing of a species. While section 7(a)(4) does not require Federal agencies to follow the section 7(a)(2) process for proposed species or proposed critical habitat, or specifically provide for the conversion of conference "conclusions and recommendations" into a final biological opinion [in contrast to explicit authority under section 7(b)(3)(B) for the conversion of preliminary biological opinions into final biological opinions], such a procedure is available to the Federal agency and the Service in appropriate instances.

If the information necessary to conduct a formal consultation is available at the conference stage, and if a formal procedure is deemed appropriate by both the Federal agency and the Service, the conference may be conducted through a procedure equivalent to formal consultation; the results, or opinion, derived from a "formal" conference may be adopted as the biological opinion when the proposed listing or designation is completed. It should be noted that the conference conclusions and recommendations would only be adopted as the biological opinion in those instances where no new data are developed, including that developed during the rulemaking process on the proposed listing or designation of critical habitat, and no changes to the Federal action are made which would alter the content of that opinion. By providing procedures which allow for a more extensive conference that may later be adopted as the biological opinion, the Service does not intend to expand upon the requirements of section 7(a)(4). Rather, this procedure is an option available to the Federal agency and the Service to help avoid conflicts and expedite consultation if the proposed species or critical habitat is listed or designated. Therefore, a new paragraph (d) is added to this final rule to acknowledge the availability of a "formal" conference procedure.

Paragraph (e) of § 402.10 discusses the documentation of the results of the conference. If the action involves only proposed species or proposed critical habitat, a copy of the recommendations will be forwarded by the Service to the Federal agency and any applicant. If an action also involves formal consultation on listed species or critical habitat, the Service will provide the recommendations on proposed species or proposed critical habitat with the biological opinion. As requested by some commenters, the final rule has been clarified to state that the conclusions of a conference will be provided with the biological opinion rather than made an integral part of ("consolidated in") the opinion. The Service does not intend that the informal nature of the conference be changed or that any of the requirements of formal consultation under section 7 be imposed on Federal agencies with respect to proposed species or proposed critical habitats unless the Federal agency specifically requests a more formal procedure. Early initiation of these discussions increases the chances of resolution of potential conflicts.

Section 402.11 Early Consultation.

The 1982 Amendments added a provision to the consultation process [section 7(a)(3)] designed to identify and to minimize, early in the planning stage of an action, potential conflicts between the action and listed species. These early consultation provisions authorize the Service to consult with Federal agencies at the request of and in cooperation with prospective applicants regarding the impact of proposed actions on listed species or critical habitat. These provisions are incorporated into the final regulations in § 402.11 (§ 402.14 of the proposed rule). The intent of this provision is to involve the Service and State and local planning and conservation entities in the planning stages of actions. The Service believes that early consultation will be helpful in establishing a mechanism for early resolution of potential conflicts. Congress did not intend that this provision be used to authorize consultation for speculative or remote actions but rather only on actions which are likely to occur. The regulations require prospective applicants to provide sufficient information describing the project, its location, the scope of activities associated with it, and the anticipated impacts to listed species to enable the Federal agency and the Service to conduct meaningful early consultations.

The opportunity for an early consultation should expedite the permitting and other regulatory processes associated with actions requiring Federal authorizations.

Contrary to the interpretation of one commenter, early consultation is not a required process, but rather is an optional step that a prospective applicant can take to factor in section 7 considerations during the initial planning stage. Although early consultation contains most of the features of formal consultation, the Service declines to adopt the suggestion to place the early consultation provisions within the formal consultation section as a "special case." Early consultation, unlike formal, is not required and occurs before any application for a permit or license is filed, whereas formal consultation is a post-application process when applicants are involved. These differences are significant and merit the separation of these distinct processes into separate sections. However, because of the extensive similarities in the procedures for early and formal consultation, the final rule has been substantially modified in format to reference appropriate paragraphs in § 402.14 (formal consultation) to avoid repetition of these common features. Although this has greatly shortened the early consultation section, the requirements and procedures have not been altered substantively.

One commenter was confused over the parameters of early consultation and informal consultation (§ 402.13). Informal consultation is a post-application process, as is formal consultation; early consultation is a pre-application process. There is no overlap. Designated non-Federal representatives can carry out informal consultation, and they can also carry out the biological assessment process if an assessment is required during the early consultation. Although only Federal agencies conduct early consultation directly with the Service, non-Federal representatives may continue to play a role in the data-gathering function of consultation.

Several commenters believed that proposed § 402.14 took away the prospective applicant's right to request early consultation and to make the initial determination of possible impacts to listed species or critical habitat. The proposed rule preserved the prospective applicant's right to request early consultation but provided the Federal agency with the responsibility for determining impacts to listed species or critical habitat. In response to comments, the final rule has been rearranged to clarify the primary role of the applicant in making the initial determination and request to the Federal agency. However, the applicant's rights under section 7(a)(3) of the Act are not unqualified, and the ultimate burden is on the applicant to meet certain threshold criteria.

Paragraph (a) of § 402.11 outlines the purpose of early consultation and is adopted substantially as proposed in § 402.14(b) and the first sentence of § 402.14(c). The legislative history is clear that the prospective applicant must be involved to the greatest extent practicable in every aspect of the early consultation process. H.R. Conf. Rep. No. 835, 97th Cong., 2d Sess. 28 (1982). One commenter expressed concern that it may not be possible to have the applicant involved in every meeting and telephone call between the Federal agency and the Service. Therefore, acknowledging the practical limitations on involving the applicant in all consultation contacts (but still recognizing the need for continuous communication with the applicant), the second sentence of paragraph (a) now reads that the prospective applicant should be involved "throughout" (instead of "in every aspect of") the consultation process.

Paragraph (b) of § 402.11 sets out the threshold conditions that must be satisfied before early consultation can be initiated and is derived from proposed § 402.14(c). As suggested by one commenter, the prospective applicant's request for early consultation should be made in writing to the Federal agency.

The "may adversely affect" threshold for initiating early consultation has been expanded to "may affect." This action was taken because the more restrictive standard unnecessarily limited access to this early review procedure, especially since at the early planning stage of an action the exact nature of a possible effect could be difficult to define.

Section 402.14(c) of the proposal established that the Federal agency ensure that the following conditions be met prior to initiation of early consultation:

(1) there must be a definitive proposal outlining the action and its effect;

(2) it must be shown that the action is technologically, administratively, and legally feasible;

(3) it must be shown that the applicant possesses adequate economic resources to conduct the action; and

(4) it must be shown that the applicant possesses some property interest in the proposed site on which the action will occur.

Numerous comments were received on these criteria. Three commenters urged the Service to strike all four conditions because of their unreasonableness and the Service's lack of authority to impose them on applicants. Other commenters criticized conditions (2) and (3) due to their ambiguity. Contending that enforcement of these conditions would preclude early consultation in many cases, the commenters noted that the information needed to meet these conditions is not available at the time that early consultation is most useful. The commenters also attacked condition (4) regarding the need to show an ownership interest in land, because early consultation would normally occur prior to the selection of an exact location for the project. Two commenters stated that conditions (1) and (2) are adequate for screening serious actions. One commenter suggested that only two criteria be addressed in determining eligibility for early consultation: scope of the project, and possible effects on listed species.

The Service was given explicit authority in section 7(a)(3) of the Act to issue guidelines that would prevent speculative or undefined actions from triggering early consultation.

> The Committee expects that the Secretary will exclude from such early consultation those actions which are remote or speculative in nature and to include only those actions which the applicant can demonstrate are likely to occur . . . . The Committee further expects that the guidelines will require the prospective applicant to provide sufficient information describing the project, its location, and the scope of activities associated with it to enable the Secretary to carry out a meaningful consultation.
>
> H.R. Rep. No. 567, 97th Cong., 2d Sess. 25 (1982).

The final rule retains proposed condition (1) that requires the nature and effect of a prospective action to be defined. Without adequate information early consultation would be meaningless. Proposed condition (2) has been modified in the final rule to require that the prospective applicant certify that it intends to implement its proposal if authorized. This will prevent highly speculative actions from entering early consultation. The Service believes that these two conditions are reasonable and will allow Federal agencies and the Service to focus their attention on concrete, feasible actions through meaningful, early consultations.

Proposed conditions (3) and (4) described above have been deleted. The Service agrees that these conditions went beyond the normal pre-application information-gathering practices of Federal agencies and that they might have discouraged early consultations unnecessarily.

Paragraph (c) of § 402.11 is adopted from proposed § 402.14(a) and the introductory paragraph of proposed § 402.14(d). This paragraph governs initiation of early consultation by the Federal agency if the prospective applicant complies with paragraph (b).

Paragraph (d) of § 402.11 governs the procedures for conducting early consultation. To eliminate unnecessary regulatory language, this paragraph cross-references the items in § 402.14(c)-(j), since the general consultation requirements are the same as for formal consultation. The proposed rule repeated these requirements in § 402.14 (d) through (i).

One commenter argued that the Service exceeded its authority in proposed paragraph (d)(3) by telling Federal agencies how to meet their responsibilities by requiring Federal agencies to involve the applicant in the data-gathering function. Although this is not included in the final rule, the Federal agency has an underlying responsibility to involve the applicant in every aspect of the early consultation to the extent possible. Moreover, the applicant may be the primary source of data used in the consultation.

If the action is a major construction activity, then a biological assessment must be prepared in accordance with § 402.12 before the request for early consultation is submitted, as is required for formal consultation. This is a change from proposed § 402.12(b)(10), which made the biological assessment optional during early consultation. The Service agrees with the comment that, for major construction activities, a meaningful early consultation must include the preparation of a biological assessment because the preliminary biological opinion issued after early consultation may be confirmed as the final biological opinion. Therefore, if early consultation is requested for a major construction activity, the Federal agency must complete a biological assessment under § 402.12 prior to submitting its request for early consultation.

The time limits and extension provisions for formal consultation are incorporated by reference as the requirements for early consultation. Several commenters felt that the "mutually agreed upon" language of the proposal [§ 402.14(e)] was too loose and that definitive time limits were needed. The Service agrees and has adopted the time limits for formal consultation to apply to early consultation as well. The Service notes that, for major construction activities, the time period will not begin to run until the biological assessment under § 402.12 is completed. Because time deadlines have been adopted, there is no need to require a written notice that consultation has been concluded, as requested by one commenter.

Proposed § 402.14(i) concerned requests by the Service for additional data, and did not require the addition of a written notice procedure for obtaining an extension. This is now required, as requested by one commenter, by incorporating the formal consultation requirements.

Proposed § 402.14(f) recognized that the Service's responsibilities during early consultation are the same as those that exist during formal consultation. The final rule retains this provision by reference. The Service is opposed to limiting the scope of its analysis of impacts during early consultation, and it is also opposed to limiting the free flow of communication among it, the Federal agency, and the applicant. Therefore, the comment suggesting that draft preliminary biological opinions not be released to the Federal agency or the prospective applicant is rejected. This is not an issue that can be dealt with on an ad hoc basis, depending on the program experience with particular agencies or regions. The policy behind early consultation is clear: full involvement of all parties, including the prospective applicant, to identify and eliminate conflicts at the earliest possible stage of a project.

Paragraph (e) of § 402.11 provides that the contents and conclusions of a preliminary biological opinion are the same as for a biological opinion issued after formal consultation in § 402.14(i). One commenter stated that biological opinions need only be issued after formal consultation under section 7(a)(2) of the Act and that this should be clarified in the rule. The Service disagrees because a "written statement" containing the Secretary's opinion is required to be given after the conclusion of both early and formal consultation. However, there is an important difference in these two types of opinions: the former has no independent, operative significance, while the latter states the Service's "final" judgment on the impacts of an action. The preliminary biological opinion, issued after the conclusion of early consultation, has no operative force until it is later confirmed by the Service under section 7(b)(3)(B) of the Act, just before the action is to be taken.

One commenter said that it is inappropriate to include an incidental take statement with a preliminary biological opinion. The Service believes that input on incidental take is essential to adequately assist the applicant in planning its action. It would be unfair to force the applicant to wait until the time for confirmation of the preliminary biological opinion to receive its first notice on the terms and conditions that must be complied with and the amount and extent of permissible incidental take. No harm results to the species by providing this statement in the preliminary biological opinion because, as stated in the rule, it does not constitute a permit to take. The "taking" exemption under section 7(o)(2) does not occur until the preliminary biological opinion is later confirmed as a final opinion under § 402.11(f).

Paragraph (f) of § 402.11 is adopted from proposed §§ 402.13(b) and 402.13(a). This paragraph acknowledges that, if certain findings are made by the Service, a preliminary biological opinion may be confirmed as a final biological opinion after formal application for a Federal license or permit is made. The rule requires the Service to make its decision on confirmation within 45 days after receipt of the Federal agency's request. As requested by one commenter, both the request and the Service's response must be in writing.

Section 402.12 Biological Assessment.

This section explains the biological assessment requirements under section 7(c) of the Act and the process that must be followed in its preparation. The requirement that biological assessments be prepared in advance of certain consultations under section 7(a)(2) was added by the 1978 Amendments. Although the Service has, as a matter of agency practice, been requiring the preparation of biological assessments in appropriate cases under the authority of section 7(c), this final rule consolidates all regulatory requirements pertaining to biological assessments.

The proposed rule addressed the biological assessment provisions in §§ 402.01(c) and 402.12(b). In response to public comments, the Service has merged these sections in the final rule into § 402.12. The new format clarifies the requirements and procedures for preparing biological assessments. Although the organization of these provisions has been changed substantially, the substance of the regulation is, except for minor amendments, the same as that presented in the proposed rule.

The informal consultation and biological assessment processes were both presented in § 402.12 of the proposed rule. This confused several commenters who believed that biological assessments could only be performed in conjunction with informal consultations. To eliminate this

confusion, the biological assessment provisions are placed in a separate section, immediately before informal consultation. Although a Federal agency may prepare a biological assessment while involved in informal consultation with the Service, there is no requirement that it do so.

References to conference, early consultation, and formal consultation in proposed § 402.12 (b)(7) (third through fifth sentences) and (b)(10) have been deleted because cross-references to the biological assessment requirement have been inserted in §§ 402.10, 402.11, and 402.14 to explain the interrelationship of these processes.

The purpose of a "biological assessment," as stated in § 402.12(a), is to evaluate the potential effects of the action on listed or proposed species or designated or proposed critical habitat and determine whether any such species and habitat are likely to be adversely affected by the action. Biological assessments are designed to assist Federal agencies in "determining whether section 7(a)(2) consultation should be initiated by identifying endangered or threatened species that may be present in the area affected by their proposed project and by identifying the impacts of those projects on such species." H.R. Rep. No. 697, 95th Cong., 1st Sess. 14 (1979). Such assessments are designed to promote the "early discovery of and elucidation" of potential endangered and threatened species conflicts with proposed agency actions. These reviews should take place well before the agency exercises its discretion to authorize, fund, or carry out an action. H.R. Rep. No. 1625, 95th Cong., 2d Sess. 20 (1978).

One commenter asked that a reference be inserted for preparation of "preliminary biological assessments." The Service does not require advance review of draft biological assessments; the requested procedure would add to statutory requirements. Therefore, the addition has not been made.

Section 402.12(b)(1) of the final rule acknowledges that the Act exempts from the biological assessment requirement those actions for which contracts were let or construction was started on or before the effective date of the 1978 Amendments. One commenter argued that the assessment requirement must not be retroactive, but should apply only to current actions as of the issuance of the final rule. The Service must follow the Act on this point and adopt the rule as proposed. This will not operate to the disadvantage of any Federal agency involved in a section 7 consultation, because the Service has been requiring the preparation of biological assessments since the effective date of the 1978 Amendments.

Section 402.12(b)(1) also recognizes that virtually any Federal agency, State or local agency, private organization, or individual (potential exemption applicants) may voluntarily prepare a biological assessment consistent with the procedures set forth in this section to assist it in fulfilling its section 7 responsibilities. One commenter urged the Service to delete the sentence referring to voluntary preparation of assessments in proposed § 402.12(b)(1) because consultation is terminated if a biological assessment is not required. The commenter's statement is only true for an action if no listed species or critical habitat are present in the proposed action area. The placement of that sentence in the proposed rule was confusing, and thus the final rule has been clarified. The Service would like to make it clear, however, that whether a biological assessment is required or voluntary bears no relation to whether a conference or formal consultation is required under §§ 402.10 or 402.14, respectively. The assessment is a tool used to identify impacts to species or habitat so that a decision can be made as to whether a proposed action is likely to adversely affect listed species or critical habitat. The biological assessment can be used to determine whether a conference or formal consultation is required.

The Act provides that any person who may wish to apply for an exemption from the requirements of section 7(a)(2) may voluntarily conduct such an assessment, in cooperation with the Service and under the supervision of the appropriate Federal agency. These potential exemption applicants must follow the procedures described in § 402.12. Under section 7(h)(2), an exemption is not permanent until a biological assessment has been prepared. A permanent exemption remains in force for a particular Federal action regardless of the listing of additional species in the action area, whereas an ordinary exemption is limited to the species involved in the section 7 consultation. Paragraph (b)(1) acknowledges these statutory provisions.

Therefore, the Service retains the flexibility inherent in paragraph (b)(1) that allows for the preparation of biological assessments in those instances where they are not specifically required by this rule. Although requested by another commenter, the Service declines to set guidelines for the exercise of discretion by other Federal agencies or applicants on the decision to voluntarily prepare assessments.

Paragraph (b)(2) has been added in response to public comments. The limitation in section 7(c)(1) of the Act on entering contracts or starting construction on an action while the preparation of a biological assessment is pending has been included in these regulations. This construction restriction applies to all actions involving the preparation of a biological assessment.

The fact that a biological assessment is not required for all actions does not mean that listed or proposed species or designated or proposed critical habitat receive less protection. Federal agencies still have an obligation to review all of their actions to determine whether formal consultation under § 402.14 is required. In addition, Federal agencies must confer on actions that are likely to jeopardize the continued existence of proposed species or result in the destruction or adverse modification of proposed critical habitat.

One commenter asked that Federal agencies be required to document any finding of "no effect" on listed species or critical habitat for actions not involving the preparation of a biological assessment. The Service has no authority to impose such a requirement but does encourage Federal agencies to use their NEPA documentation to illustrate their analysis of Endangered Species Act issues.

The Service reserves the right to request that an agency prepare a biological assessment. One commenter questioned the right of the Service to request assessments when such are not otherwise required by the Act. Another commenter feared that the Service would routinely request field studies with many of the characteristics of biological assessments, regardless of the action's potential effects, the acceptability of a general field reconnaissance, or the obligation of the Service to provide guidance and data. The Service's request for a biological assessment or for field studies is not a mandatory effect; a Federal agency may reject any such request. The Service recognizes that consultation involves a two-way flow of information. It will always strive to provide data that are available and to assist in designing or conducting studies (within budgetary constraints and available staffing) or gathering data through consultation.

Paragraph (c) of § 402.12 covers the request by a Federal agency for a species list from the Service. This paragraph was adapted from § 402.12(b)(1) (first sentence) of the proposed rule. Paragraph (d) of § 402.

involves the Director's issuance of a species list. This paragraph was adapted from § 402.12(b)(2) of the proposed rule.

The biological assessment process begins when a Federal agency decides that its action is a major construction activity, as discussed in these regulations, or it decides that it will voluntarily prepare a biological assessment. The Federal agency or the designated non-Federal representative requests information on whether listed or proposed species or designated or proposed critical habitat may be present in the action area. Within 30 days of receipt of that inquiry, the Director will respond with a list of any such species and critical habitat that may be present, as well as the available data (or references thereto). This may include recommendations for studies or surveys that may assist in the preparation of the biological assessment.

Contrary to the contentions of several commenters, the request for a species list is mandatory under section 7(c) for any major construction activity, unless the Federal agency forwards its own list for the Director's concurrence as explained below. This is not a burdensome requirement, even for apparent "no effect" actions, since the entire process, including the Director's response that no listed species or critical habitat occurs in the action area, may be carried out without delay through the NEPA process.

In response to comments, the final regulations explicitly allow the Federal agency or the designated non-Federal representative to proceed with the preparation of the biological assessment prior to receiving a species list from the Service. In this situation, the Federal agency or the designated non-Federal representative is required to notify the Director in writing as to the species and critical habitat that are being included in the assessment. As recommended by three commenters, the Service will respond to this notification in writing within 30 days as to whether it concurs with the species and critical habitat to be covered in the biological assessment.

One commenter suggested that an applicant should have an opportunity to informally request a species list to assist it during the planning stage of a project. Then, if the applicant begins preparation of a biological assessment within 90 days of receipt of this "informal" list, the commenter thought that the Service should not amend the list at a later time. The commenter appears to be advocating an opportunity for early consultation, which is provided for under § 402.11 of this final rule.

Nevertheless, the request that a species list not be modified once issued might backfire on the applicant, because § 402.14 requires consultation on all listed species and critical habitat that may be affected by a Federal action. Even if a species is inadvertently omitted from the species list and biological assessment, the Act nevertheless requires that it must be considered in satisfying the requirements of section 7(a)(2). Thus, the sooner the Service notifies the applicant of additional species to be included in a required biological assessment, the sooner the consultations will be completed.

In addition to listed or proposed species or designated or proposed critical habitat, the Service will include candidate species in the species list. Candidate species are those species being considered for listing but not yet the subject of a proposed rule. This will inform the Federal agency and any applicant of potential proposals for listing. Candidate species have no legal status and are accorded no legal protection under the Act, and thus the Federal agency need not include them in a biological assessment. However, should a candidate species become proposed or listed prior to completion of the action, a conference or formal consultation may be required.

Several commenters asked that species lists be "site-specific" and not regional in scope. One of these commenters urged the Service to include only species actually known or believed to occur in the action area. The Service agrees that the species list should be tailored to the action area and that field personnel should take care that the list is not overinclusive. However, the Act requires the Service to provide a list of all listed or proposed species that "may be present" in the action area. Thus, migratory species that "may be present" at some point within the action area must be included in the species list.

Another commenter said that the Service should include only species in the list that it believes may be affected by the action. This approach is not consistent with section 7(c), which requires a disclosure of all species that "may be present" in the action area. The comment would also eliminate the Federal agency's right to make an initial evaluation of possible effects to each species.

One commenter's conclusion that a determination of no adverse effect after receipt of the species list, but before preparation of the assessment, eliminates the need to prepare the assessment and concludes consultation is erroneous. The biological assessment is used to determine whether an activity "is likely to adversely affect" listed species or critical habitat. Consultation does not conclude unless the Service concurs in writing with the finding of the biological assessment indicating that the action is not likely to adversely affect listed species or critical habitat.

The Service has clarified paragraph (d)(1) to accommodate the concern of the House Committee that biological assessments not be required on major construction activities affecting proposed species or proposed critical habitat only. However, if a species list includes both listed and proposed species, each must be considered in the biological assessment as required by section 7(c) of the Act.

Concerned that the Federal agency should receive all information during the assessment process, one commenter asked that the species list be delivered to both the Federal agency and its designated non-Federal representative due to the agency's responsibility to supervise the preparation of the assessment. The Service declines to include this requirement in the rule, but will forward a copy to the Federal agency, if requested. It is the Federal agency's responsibility to decide whether it wants to designate a non-Federal representative, and if one is designated, the species list will be sent to the representative as requested by the Federal agency.

Several commenters suggested that the Service's ability to recommend "necessary" studies or surveys would contravene the "best available scientific and commercial data" standard of section 7(a)(2). The Service agrees that the proposed language may have implied that additional studies or surveys were required or necessary to complete the assessment. Therefore, the sentence is changed to state that the Service may recommend studies or surveys that it believes would assist in the preparation of the assessment. A new sentence is also added to clarify that such a recommendation is not to be construed as the Service's opinion that the Federal agency has failed to satisfy the information standard of section 7(a)(2) of the Act. This change preserves the Service's prerogative to request further studies if deemed appropriate, while recognizing the ultimate responsibility of the Federal agency to secure the best available data. Two commenters suggested that the request for studies be limited to studies necessary to locate and assemble already existing data. The Service declines to so limit the scope of studies it may request.

Paragraph (e) of § 402.12 is carried over from § 402.12(b)(3) of the proposal.

It requires a party preparing a biological assessment to verify its species list with the Service if, after 90 days from the receipt of or concurrence with the species list, it has yet to commence the preparation of the assessment. A written verification, as suggested by one commenter, is not required since that would be tantamount to issuing a second species list, contrary to the informal nature of this verification step. The Federal agency may, on its own, document the verification received under this paragraph in its administrative record. As requested by one commenter, the Service has distinguished the initiation of the biological assessment time period (time of receipt of or concurrence with a species list) from the point at which actual preparation of the assessment is begun.

Based on comments received, a new paragraph (f) entitled "contents" has been added. Some commenters argued that Federal agencies should be required to include certain minimum research methods or activities in the preparation of a biological assessment. One commenter suggested that preparers of biological assessments should:

(a) conduct a scientifically sound on-site inspection of the area affected by the action, which must, unless otherwise directed by the Service, include a detailed survey of the area to determine if listed or proposed species are present or occur seasonally and whether suitable habitat exists within the area for either expanding the existing population or potential reintroduction of populations;

(b) interview recognized experts on the species at issue, including those within the Fish and Wildlife Service, the National Marine Fisheries Service, State conservation agencies, universities and others who may have data not yet found in scientific literature;

(c) review literature and other scientific data including recovery plans if available to determine the species' distribution, habitat needs, and other biological requirements;

(d) review and analyze the effects of the action on the species, in terms of individuals and populations, including consideration of the indirect and cumulative effects of the action on the species and habitat;

(e) analyze alternate actions that may provide conservation measures; and

(f) conduct any studies necessary to fulfill the requirements of (a) through (e) above.

The Service agrees that assessments should be as complete and thorough as possible, but declines to impose strict minimum standards that all biological assessments must satisfy. The above-listed activities, which may be performed in preparing an assessment, are endorsed by the Service as items that a model assessment would include. However, the nature of the Federal action may not warrant carrying out all of these research activities or studies, and some of the steps may not be technologically feasible in certain cases. Therefore, the new paragraph (f) only contains suggestions of what a Federal agency may include in a biological assessment.

One commenter asked the Service to explain the difference between the degree of information needed in a biological assessment and the degree of information needed to initiate formal consultation when the action does not require the preparation of an assessment. In both cases the overall information standard is the same: "best scientific and commercial data available." The difference arises in the process. If a biological assessment is prepared, it must include not only the data but also a synthesis of the data involving an analysis of the effects of the action. Basically, the assessment serves as an analytical instrument and can be used by the Federal agency "to build its case" as to whether a particular action is likely to adversely affect a listed species or its critical habitat. If the Service concurs with a determination of "not likely to adversely affect," then formal consultation is not required. If an assessment is not required, the Federal agency need only submit data to the Service to initiate formal consultation pursuant to § 402.14(c).

Paragraph (g) of § 402.12, which deals with the authority to incorporate earlier biological assessments by reference as the assessment for a current proposal, is adopted from the last two sentences of proposed § 402.12(b)(1). In those instances where a proposed Federal action is identical, or very similar, to a previous action for which a biological assessment was prepared, the Federal agency may not need to prepare a new biological assessment.

One commenter requested that language be added to clarify that a previous biological assessment being incorporated by reference could have been part of a prior EIS or area-wide assessment. The Service declines to make the change noting that the form of the previous biological assessment (whether in an EIS or other document) has no bearing on whether it meets the conditions for incorporation by reference.

In response to comments, the conditions that must be met for incorporation by reference are clarified. The biological assessment requirement may be fulfilled by incorporating by reference the earlier biological assessment and supporting data into a written certification that: (1) the proposed action involves similar impacts to the same species in the same geographic area; (2) no new species have been listed or proposed or critical habitat designated or proposed for the action area; and (3) the biological assessment has been supplemented with any relevant changes in information.

Condition (1) has been expanded to allow incorporation by reference if the proposed action involves similar impacts (rather than no new impacts). The term "or administrative unit" has been deleted as it is substantially the same as "geographic area." The Service adds "for the action area" at the end of condition (2) to clarify the scope of the certification. Finally, condition (3) is changed to allow Federal agencies to incorporate a former biological assessment by reference while supplementing it with any relevant changes in information. This change clarifies the intent behind this paragraph.

Paragraph (h) of § 402.12, which cross references permit requirements under the Act that may apply to the preparation of a biological assessment, is adopted as proposed in § 402.12(b)(4)(i). The Service believes that the references in the rule are adequate to alert Federal agencies and/or designated non-Federal representatives of the need to consider applicable permit requirements, rather than include the appropriate section 10 permit requirements in these regulations, as suggested by one commenter. Certain field work might involve the take (i.e., harassment, harm, etc.) of listed species which, absent a permit, would violate sections 9 or 4(d) of the Act. To avoid possible violations, the Federal agency or non-Federal representative should apply for and obtain a section 10 permit for such field work. Those individuals carrying out field studies or other research without permit during the section 7 consultation process are subject to the prohibitions in the Act and other applicable wildlife laws. The Service emphasizes that permits should be obtained if takings of any listed species are anticipated.

Paragraph (i) of § 402.12 specifies the time period for completing a biological assessment and sets out the requirements for any needed extension. This paragraph is taken substantially from § 402.12(b)(6) of the proposed rule.

Two commenters asked that the rule require written notice of all extensions regardless of whether an applicant is involved. A written notice from the Federal agency to the applicant is required if an extension is agreed upon between the Service and the Federal agency, and such written notice must be provided by the Federal agency prior

the expiration of the 180-day time period. However, the Service declines to require a written notice if an applicant is not involved in the consultation, because responsibility for the preparation and completion of the biological assessment rests with the Federal agency. The Service will defer to the needs and judgment of the Federal agency which can document the extension in its administrative record.

Another commenter asked that the Service explain that the 180-day time period begins on the date of receipt of the species list (or the date of receipt of the Director's concurrence with the Federal agency species list). This change has been made since it clarifies when the time period begins and is consistent with the intent of this paragraph.

As noted above, if an applicant is involved, the 180-day period may not be extended unless the agency provides the applicant, before the close of the 180-day period, with a written statement setting forth the estimated length of the proposed extension and the reasons why an extension is necessary. The applicant has no remedy to expedite the preparation of the biological assessment under section 7(c) of the Act. Thus, the 180-day time period is subject to an indefinite extension at the Federal agency's prerogative. The Service lacks statutory authority to impose an appeal process to review extensions, as requested by two commenters.

Paragraph (j) of § 402.12, which requires the submission of completed biological assessments to the Director for review, is adopted from proposed § 402.12(b)(4)(iii). In response to two comments, the Director will make a written response within 30 days after receiving the complete assessment as to whether or not the Service concurs with the findings in the assessment. This change provides Federal agencies with a written record acknowledging the Service's receipt of the biological assessment and indicating the results of the Service's review.

A new sentence is added to this paragraph to clarify that the Federal agency may initiate formal consultation concurrently with the submission of the assessment to the Director.

In response to one comment, the Service declines to substitute "Service" for "Director" in this paragraph. It is important that the Director or his authorized representative directly receive the biological assessment for review so that a timely review can be facilitated.

Paragraph (k) of § 402.12, governing the use of a completed biological assessment, is derived from § 402.12(b)(7) of the proposed rule. Once the biological assessment has been completed, the Federal agency must consider whether formal consultation should be initiated or if a conference is necessary. Three commenters noted that a written notice of concurrence should be issued by the Director if the Service agrees with the Federal agency's finding that its action is not likely to adversely affect listed species or critical habitat (*i.e.*, the Service concurs in writing that formal consultation is not needed). This comment has been accommodated by appropriate changes to paragraphs (j) and (k).

The proposed § 402.12(b)(6), "Assistance from other sources," has not been included in the biological assessment section of the final rules. The substance of this paragraph has been included in the final § 402.08 dealing with designated non-Federal representatives. The first two sentences have been deleted since a Federal agency may obtain assistance from any source to aid in the preparation of a biological assessment (or other aspect of consultation), and it does not need to be authorized in these regulations. One commenter suggested that the Service be included as a source of information; however, assistance from the Service is already included in appropriate sections of the regulations.

Section 402.13 Informal Consultation.

Informal consultation is an optional procedure that includes all contacts between the Service and the Federal agency or the designated non-Federal representative prior to formal consultation, if required. It is designed primarily to except from the formal consultation process those proposed actions which, upon further informal review, are found not likely to adversely affect a listed species or critical habitat. If the Service concurs with such a determination, formal consultation is not required. The final rule is adopted largely by combining proposed §§ 402.12(e), 402.13(c), and 402.13(f)(1), into one composite statement of the purpose and scope of informal consultation.

Several commenters disagreed on the scope of informal consultation. One commenter felt that informal consultation should include all dialogue between the Service, the Federal agency, and any designated non-Federal representative in determining whether formal consultation is required. Another commenter recommended that informal consultation be available if listed species are found in the action area. The Service believes that informal consultation encompasses all of these communications between the Service, the Federal agency, and the designated non-Federal representative, as well as others. The Service is available for informal consultation at any time; the decision on whether to seek informal consultation is that of the Federal agency. The Service agrees that, if requested as a part of informal consultation, it should participate in NEPA scoping meetings.

The Service declines to specify uniform levels of contact that must be followed in conducting informal consultations. Existing relationships between the Service's field or regional offices and particular Federal agencies mandate maximum flexibility. The present system is working well and efficiently addresses the needs of other Federal agencies, and it is therefore retained.

Because informal consultation is an optional process that is under the control of the Federal agency as to its initiation and duration, the Service declines to require notices of initiation and/or termination. Such a step would merely place paperwork burdens on the Federal agency in an otherwise voluntary process.

As noted in § 402.12, biological assessments are required for major construction activities. To clarify a procedural point, the Service notes that the biological assessment process may be conducted simultaneously with informal consultation if desired by the Federal agency, or the Federal agency may choose to undertake the biological assessment without any informal consultation. Whether or not a biological assessment is required, the Federal agency may choose to enter into informal consultation.

In response to many comments, the Service has made numerous adjustments throughout these regulations to eliminate references to informal consultation as a prerequisite to formal consultation. The Service agrees that such a process would not be workable, both as a result of limited consultation resources and the need to respect Federal agency program discretion. As previously noted, the proposed rule required formal consultation if the action "may adversely affect" listed species or critical habitat. "Beneficial" actions were excused from formal consultation if the Service concurred during the mandatory informal consultation. Since informal consultation has been made strictly an optional process in this final rule, the Service retains, from the 1978 rule, the "may affect" trigger for formal consultation in § 402.14 of the final rule.

Under this final rule, if a Federal agency determines that its action "may affect" listed species or critical habitat, then formal consultation is required unless an exception applies. One exception is that a Federal agency may, through informal consultation, utilize the expertise of the Service to evaluate the agency's assessment of potential effects or to suggest modifications to the action to avoid potential adverse effects. If, as a result of informal consultation, the Federal agency determines, and the Service concurs, that the action (or modified action) is "not likely to adversely affect" listed species or critical habitat, then formal consultation is not required. The consultation process would terminate with the written concurrence of the Service. Therefore, through this informal consultation process, those activities which are found to have beneficial, discountable, or insignificant effects upon listed species or their critical habitats could be deemed to be in compliance with section 7(a)(2) without formal consultation. If a "not likely to adversely affect" determination cannot be made during informal consultation, then formal consultation is required for those Federal actions that "may affect" listed species or their critical habitat.

In short, the final rule retains the general requirement for formal consultation if the Federal agency determines that its action "may affect" listed species or critical habitat. The Federal agency may, however, through voluntary informal consultation with the Service, forego formal consultation and promptly implement actions that the agency and the Service agree are not likely to adversely affect listed species or critical habitat. The Service finds that this reformulation of the consultation process is not significantly different from the current practice, except that, as a result of informal consultation, biological opinions will no longer be required for actions that "are not likely to adversely affect" listed species or critical habitat.

The Service could not accommodate all concerns expressed on this issue. Two commenters contended that the "may adversely affect" standard for initiating formal consultation yielded too much discretion to action agencies. They stated that such a threshold would shift the benefit of the doubt from one in favor of the listed species to one in favor of the Federal agency's action. Noting the Service's expertise on wildlife issues, the commenter urged the Service to reverse this shift. As noted above, the Service did not intend to reverse the burden of proof with the focus on "adverse effects." The goal is to reduce procedural barriers for actions which the Service believes are not likely to have an adverse effect, while retaining full protection for listed species or critical habitat. The changes noted above address these commenters' concern. However, other commenters who suggested a shift in the burden of proof cannot be accommodated. The commenters that urged a "would adversely affect" standard for triggering formal consultation, a standard that might be interpreted as requiring a showing of effects that destroy or adversely modify critical habitat or are likely to jeopardize the continued existence of listed species, are requesting a trigger for formal consultation that the Service believes is too close to the "jeopardy" standard of section 7(a)(2). The threshold for formal consultation must be set sufficiently low to allow Federal agencies to satisfy their duty to "insure" under section 7(a)(2). Therefore, the burden is on the Federal agency to show the absence of likely, adverse effects to listed species or critical habitat as a result of its proposed action in order to be excepted from the formal consultation obligation.

The Service believes that informal consultation is extremely important and may resolve potential conflicts (adverse effects) and eliminate the need for formal consultation. Through informal consultation, the Service can work with the Federal agency and any applicant and suggest modifications to the action to reduce or eliminate adverse effects. If a Federal agency modifies its action so that the action is not likely to adversely affect listed species or critical habitat, then formal consultation is not required.

Section 402.14 Formal Consultation.

These regulations require Federal agencies to review their actions to determine whether they "may affect" listed species or critical habitat. Formal consultation procedures must be initiated if such a situation exists, unless, with the written concurrence of the Service, the Federal agency determines through informal consultation and/or through the biological assessment process that its action is not likely to adversely affect listed species or critical habitat. As noted above in regard to § 402.13, the final rule adopts the "may affect" standard of the 1978 rule, with a special provision allowing actions "not likely to adversely affect" to by-pass the formal consultation process as a result of informal consultation with the Service.

Paragraph (a) of § 402.14 sets out the requirements for formal consultation. This paragraph is a composite of paragraphs (a) and (k) of proposed § 402.13. Paragraph (b), which sets out the exceptions to the initiation requirement of (a), was taken primarily from proposed §§ 402.12(b)(7) and 402.13 (b) and (c).

The Service declines to substitute "may" for "shall" in describing the Federal agency's responsibilities in paragraph (a), as requested by one commenter. Federal agencies have an obligation under section 7(a)(2) of the Act to determine whether their actions may affect listed species and whether formal consultation is required under these regulations. However, the Service does not intend to mandate the timing of this review, which is solely at the discretion of the Federal agency. Early review of its actions is to the advantage of the Federal agency so that compliance with section 7 can be attained without undue delays to its action.

Paragraph (a) also includes a provision for the Director to request a Federal agency to enter into consultation. Two commenters asked that the final rule empower the Director to require a Federal agency to consult. Although the Service will, when appropriate, request consultation on particular Federal actions, it lacks the authority to require the initiation of consultation. The determination of possible effects is the Federal agency's responsibility. The Federal agency has the ultimate duty to ensure that its actions are not likely to jeopardize listed species or adversely modify critical habitat. The Federal agency makes the final decision on whether consultation required, and it likewise bears the risk of an erroneous decision.

The last sentence of proposed § 402.13(a), dealing with Service assistance to Federal agencies, has been deleted as it is more appropriately addressed in the preamble. The Federal agency may obtain information and advice from the Service, but this is a supplement to, and not a substitute for, formal consultation. The Service believes that there should be a continuous dialogue between the Service and the Federal agency involving the exchange of information and assistance as part of the formal consultation.

Unless a Federal agency chooses to avail itself of the exceptions in paragraph (b), it must initiate formal consultation if its proposed action "may affect" listed species or critical habitat. Any possible effect, whether beneficial, benign, adverse, or of an undetermined character, triggers the formal consultation requirement, as suggested

by one commenter. However, although informal consultation is not required, a Federal agency may use that process and/or the biological assessment process to remove an action that "is not likely to adversely affect" listed species or critical habitat from the formal consultation requirement.

Proposed paragraph (c), a "no adverse effect" exception, was attacked as weakening the Act. One commenter remarked that this procedure unrealistically allows Federal agencies to determine the presence of a "detrimental effect," through informal consultation, when the precise objective of formal consultation is to reach that same goal. The Service does not agree, because formal consultation is conducted to determine if an action is likely to jeopardize the continued existence of listed species or result in the destruction or adverse modification of critical habitat. Adverse effects may exist without constituting jeopardy. However, the Service has changed the trigger for formal consultation to "may affect" with certain exceptions contained in paragraph (b).

The exceptions in paragraph (b) are derived from the "will not adversely affect" exception in proposed § 402.13(c) and from the confirmation of the preliminary biological opinion in proposed § 402.13(b). The first exception is modified to "not likely to adversely affect" to make the biological assessment provisions compatible with the formal consultation provisions. Under section 7(c) of the Act, a biological assessment is completed to facilitate compliance with the consultation provisions of section 7(a)(2) by identifying whether any species or critical habitat is "likely to be affected." If the Federal agency determines, with Service concurrence, that its action is not likely to adversely affect any listed species or critical habitat, there is no need for formal consultation.

Imposing the time delays and information responsibilities of formal consultation on such actions would not provide any additional protection to listed species or critical habitat and may discourage interagency cooperation. Regulatory flexibility is appropriate here to eliminate undue burdens. By requiring the Service's "written concurrence" with a "not likely to adversely affect" finding as a prerequisite to invoking the exception to formal consultation, the Service believes it has retained adequate review authority through informal consultation. If the information made available during informal consultation is not sufficient to make this determination, formal consultation is required. The case of *Romero-Barcelo v. Brown*, 643 F.2d 835 (1st Cir. 1981), *rev'd on other grounds sub nom. Weinberger v. Romero-Barcelo*, 456 U.S. 305 (1982), does not preclude this change. That decision interpreted the 1977 rule but did not set a minimum threshold for initiation of formal consultation under the Act. Paragraphs (a) and (b), as adopted, are totally within the statutory authority of the Service.

The other exception to the general formal consultation requirement is the confirmation of a preliminary biological opinion as the final biological opinion. If early consultation takes place, the Service will issue a preliminary biological opinion. When the prospective applicant applies for a Federal permit or license, the Federal agency may request that the Service confirm the preliminary biological opinion as the final biological opinion that would have been issued after formal consultation. If the Service reviews the proposed action and finds no significant changes in the action as planned and no significant changes in the information used during early consultation, such a confirmation will be issued. Consultation is required if the preliminary biological opinion is not confirmed.

Paragraph (c) of § 402.14 specifies the required contents of a request for formal consultation. This paragraph is adopted substantially from proposed §§ 402.12(b)(7) and 402.13(d).

According to one commenter, the information requirements of paragraph (c), which apply to all actions involved in formal consultation, lack statutory authority. The Service cites the obligation to use the "best scientific and commercial data available" and the overall responsibility to consult in good faith under section 7(a)(2) as ample authority for the information requirements. Proposed item (vi), requiring a list of Federal agencies that have jurisdiction in the action area and how they may be affected, is too broad since much of this information would be unrelated to the consultation. Other Federal actions that are interrelated or interdependent would be discussed along with the effects of the action. Therefore, this item is not included in the final rule. The remaining items are essential in determining the parameters of the action, the extent, duration, and severity of its impacts, and the effects of other actions in the action area. The Service retains these essential information requirements, although it has noted under subparagraph (8) that only "relevant" reports, including environmental impact statements, etc., need be supplied, because consultations will in most cases be completed prior to the production of final NEPA documentation for the subject action.

The concluding sentences of paragraph (c) permit Federal agencies, subject to the Director's approval, to tailor their requests for consultation to a particular segment of a comprehensive plan, so long as the effects of the action as a whole are considered. To clarify this passage, as requested by one commenter, the Service uses the example of the management, pursuant to a comprehensive plan, of a National Wildlife Refuge that is inhabited by a listed species. Section 7 consultation may be undertaken on a segment of that management program, such as big-game hunting, and a biological opinion will be issued on that phase of the program only. However, in formulating its biological opinion, the Service must consider the effects, including indirect effects, of the action as a whole, and cumulative effects of unrelated management programs in reaching the conclusion of "jeopardy" or "no jeopardy." The concluding passage of paragraph (c) illustrates the flexibility inherent in the formal consultation process and the care with which the protections of section 7 are preserved.

Paragraph (d) of § 402.14 repeats the required information standard of section 7(a)(2): "best scientific and commercial data available." This paragraph is adopted essentially without change from proposed § 402.13(d)(2), except that, pursuant to public comment, the Service changed "biological information" to "scientific and commercial data" to bring the language of the regulation in line with the Act. One commenter suggested that the phrase "or which can be developed during the consultation process" be removed from this paragraph. The Service has modified the wording to state that the information referred to in this paragraph is information that can be obtained during the consultation. We believe that information could become available at any time during the consultation, and such information should be submitted to the Service for its consideration. The legislative history of the 1978 Amendments supports this provision. H.R. Conf. Rep. No. 697, 95th Cong., 1st Sess. 12 (1978). The Service is satisfied that this paragraph adequately mandates the use of the best available scientific and commercial data, requires Federal agencies to supply this data at any time during formal consultation, and recognizes that this information requirement is a Federal agency

responsibility—not an obligation of the Service.

Paragraph (d) of § 402.14 also adopts a portion of § 402.15(d)(3) of the proposed rule that requires the Federal agency to provide any applicant with the opportunity to participate in formal consultations, including submitting information for consideration during the consultation. The remainder of proposed § 402.15(d)(3) was deleted because it duplicated other parts of the final rule.

Paragraph (e) of § 402.14 establishes the time period for conducting formal consultations and explains the process for extending the consultation period. The paragraph is adopted substantially as proposed in § 402.15(e), with certain technical, clarifying amendments.

The Amendments changed the timing requirement on the conclusion of formal consultation from the 60 days originally established by the 1978 rule to a maximum of 90 days or to such time periods as discussed below. If an applicant is involved, the Service and the Federal agency may mutually agree to extend consultation for up to 60 additional days without the consent of the applicant, provided that the Service submits to the applicant, before the close of the initial 90-day period a written statement setting forth (1) the reasons why a longer period is required, (2) the information that is required to complete the consultation, and (3) the estimated date on which the consultation will be completed. A consultation involving an applicant cannot be extended for more than 60 days without the consent of the applicant. The biological opinion must be delivered to the Federal agency and any applicant promptly after the conclusion of formal consultation (within 45 days).

One commenter suggested that a provision be added that would require the Service to issue a notice concluding formal consultation with a finding that it has sufficient information to prepare a biological opinion. The Service declines to adopt this comment. At the end of the 90-day period (unless extended), the parties to the consultation realize that the Service has but 45 days to deliver its biological opinion to the Federal agency and any applicant. A mandatory notice of "sufficient information" might be, in some cases, misleading by creating the impression that additional information or studies may not be advisable. The Service must develop its biological opinion based upon the best scientific and commercial data available regardless of the "sufficiency" of that data. Therefore, the suggested change does not accurately reflect the legal framework within which the Service must operate.

The Service has defined the statutory directive to issue biological opinions "promptly after" the conclusion of formal consultation as requiring the delivery of a biological opinion to the Federal agency and any applicant within 45 days. Several commenters agreed with this stipulated deadline as long as the applicant retains some control over extensions. Other commenters felt that the 45-day period was excessive, and they argued that the opinion drafting period should either be worked out with mutually-agreeable extensions or the opinion should be issued by the end of the consultation period. The Service retains the 45-day drafting period as consistent with the statutory requirement and as a necessary time period to further refine biological opinions after the conclusion of formal consultation.

One sentence has been added to paragraph (e) to acknowledge the ability of the Service and the Federal agency, where no applicant is involved, to extend consultation for a mutually-agreeable time period. This clarification satisfies the request of one commenter.

Paragraph (f) of § 402.14, which governs Service requests for additional information, is adopted from § 402.15(j)(1) of the proposed rule. The Service declines to rename this paragraph "extension of consultation" because that topic is generally covered in paragraph (e).

In some cases, the Service may determine that additional information would enhance the formulation of its biological opinion. To cover this situation, the final rule adopts the procedures discussed by Congress in the legislative history of the 1979 Amendments. S. Conf. Rep. No. 697, 96th Cong., 1st Sess. 12 (1979). When additional data is believed to be advantageous, the Service will request an extension of formal consultation. When the Service requests such an extension, it will identify the types of additional data sought for assisting consultation. The Service will, to the extent practicable, and within existing budgetary and personnel restrictions, provide assistance in planning studies, furnishing relevant data, and providing recommendations that may be necessary to obtain the additional data. The responsibility for conducting and funding any studies, however, belongs to the Federal agencies or the applicant and not to the Service.

The comments received on this paragraph covered a wide spectrum of opinion as to the breadth of the Service's authority to request additional data. Some commenters questioned the statutory authority of the Service under this provision, and they erroneously interpreted the Service's ability to *request* additional data as the authority to *require* an extension of formal consultation to obtain such data. Their position was that additional data was not a valid reason for seeking an extension of formal consultation and that additional data should only be sought when obtaining it would not delay the consultation and when the Service is willing to fund the studies. Another commenter went further, suggesting that the request for additional data be treated as an extraordinary measure that should be invoked "reluctantly and only on rare occasions." The commenter said that the Service should affirmatively state that existing data is presumed to be adequate and that the Service bears the burden of demonstrating inadequacy before seeking additional data.

On the other end of the spectrum, several commenters faulted the Service for not requiring an extension so that additional data could be obtained under this paragraph. Citing the Federal agency's statutory duty to use the "best scientific and commercial data available" and the decision in *Roosevelt Campobello International Park Commission v. EPA*, 684 F.2d 1041 (1st Cir. 1982) ("*Pittston* case"), these commenters noted that Federal agencies are required by section 7(a)(2) to do "all that [is] practicable" to develop information for the consultation. *Pittston* case, *supra*. According to the commenters, the proposed rule gave too much discretion to Federal agencies in controlling the information used in the consultation process.

The Service adopts the proposed rule because it recognizes the need for an opportunity to request additional data while deferring to the Congressional intent that consultation have a definite end point. Additional data may be requested by the Service, but the Service is not relieved of its duty to issue a biological opinion unless appropriate time extensions are obtained under paragraph (e).

However, Federal agencies and applicants are cautioned that they bear the burden under section 7(a)(2) to show that they have obtained the best available scientific and commercial data. This is not the Service's burden or obligation, but the Service does have the responsibility to alert the Federal agency and any applicant of areas where additional data would provide a better information base from which to

formulate a biological opinion. This advice from the Service is intended to help the Federal agency to better satisfy its duty to *insure* that its action is not likely to jeopardize listed species or adversely modify critical habitat.

A Service request for additional data will not be used as a vehicle for burdening applicants with unnecessary studies and inordinate delays, as feared by one commenter. As in the *Pittston* case, these requests will be limited to readily obtainable data that would assist the Service in formulating its biological opinion. In paragraph (f), as in *Pittston*, a distinction must be made between requests for special research projects and requests for routine, customary data collection activities. Moreover, paragraph (f) does not take the final decision regarding the acquisition of additional data away from the Federal agency. The agency still has the discretion to reject the Service's request for additional data provided it is not arbitrary or capricious in doing so. The paragraph has been clarified to state that the Federal agency, when collecting additional data, shall do so to the extent practicable and within the timeframe of the agreed upon extension.

The Service, in requesting additional data, will not comment as to the overall adequacy of the Federal agency's data. It is the agency's burden to obtain credible data. The Service's request for additional data, just as the Federal agency's inability to complete any agreed upon collection of data, should not be interpreted as evidence that the Federal agency has failed to meet the information standard of section 7(a)(2); it would merely represent the Service's belief that the additional data would improve the consultation data base so that it could issue the best biological opinion possible. The Service, therefore, has added language to the final rule to clarify this provision.

As discussed above, if an extension is not agreed to in accordance with paragraph (e), the Service shall issue a biological opinion based on the best scientific and commercial data made available during the consultation. The Conference Report to the 1978 Amendments states that in this situation, the Federal agency has a continuing responsibility to make a reasonable effort to develop additional data. H.R. Conf. Rep. No. 697, 95th Cong., 2d Sess. 12 (1978). By initiating informal consultation with the Service at an early stage of the development of a proposed action, the Federal agency would, in most cases, minimize the need to request an extension of formal consultation because of a lack of data.

In formulating its biological opinion, the Service must provide the "benefit of the doubt" to the species concerned. H.R. Conf. Rep. No. 697, *supra*, at 12. In addition, a biological opinion must be developed within the consultation timeframe based upon the best scientific and commercial data available. Though requested by several commenters, the Service is not authorized to condition its "no jeopardy" opinions with "safeguards" or to issue "may jeopardize" opinions in retaliation for an agency refusal to extend consultation or to develop additional data.

The Service was requested to publish availability notices for biological opinions to facilitate public participation in the conservation of listed species. For the reasons noted previously in response to a general comment, the Service declines to impose such a requirement on itself as an amendment to paragraph (f).

Paragraph (g) of § 402.14, which sets out the Service's responsibilities during formal consultation, is adopted from proposed § 402.15(f) with only minor changes to clarify the Service's responsibilities. The public comments concerning paragraph (g) focused on the fifth item: the responsibility to discuss the availability of reasonable and prudent alternatives. The Service is committed to working closely with Federal agencies and any applicants in the development of reasonable and prudent alternatives. However, the Service is unable to agree that a draft reasonable and prudent alternative should be excluded from the biological opinion if the Federal agency disagrees as to its reasonableness, as suggested by one commenter. The Service will, in most cases, defer to the Federal agency's expertise and judgment as to the feasibility of an alternative. Nevertheless, in those instances where the Service disagrees with a Federal agency's assessment of the reasonableness of its alternatives, the Service must reserve the right to include those alternatives in the biological opinion if it determines that they are "reasonable and prudent" according to the standards set out in the definition in § 402.02; the Service cannot abdicate its ultimate duty to formulate these alternatives by giving Federal agencies control over the content of a biological opinion.

Paragraph (g) provides for Federal agency and applicant review of the basis for any finding contained in draft biological opinions, including the availability of reasonable and prudent alternatives. Four commenters requested that the final rule clarify whether an applicant was entitled to receive a copy of the draft biological opinion. The Service believes that the applicant should participate in the review and should receive a copy of the draft opinion from the Federal agency. The final rule includes this provision.

The release of draft opinions to Federal agencies and any applicants (through the Federal agency) facilitates a more meaningful exchange of information. Review of draft opinions may result in the development and submission of additional data, and the preparation of more thorough biological opinions. Two commenters opposed the release of draft biological opinions. Although they were supportive of open communication and mediation between the Service and the Federal agency during the consultation time period, the commenters opposed Federal agency review of draft opinions because agencies could bring pressure on the Service to modify a particular reasonable and prudent alternative or to convert the opinion's conclusion from "jeopardy" to "no jeopardy." If there were any discussions needed regarding the reasonable and prudent alternatives, noted the commenters, this could be done in "further discussion" after the issuance of the biological opinion. The Service disagrees that Federal agency review of draft biological opinions will result in "rewritten" biological opinions, unless valid biological reasons mandate a change. Federal agency review of draft opinions helps ensure the technical accuracy of the opinion, and may save time and resources by resolving these issues early. The Service believes that the availability of draft biological opinions is a meaningful process and has retained it in the final rule. As noted previously in the "Definitions" section, "further discussion" has been deleted from this rule. Thus, through the discussions between the Service and the Federal agency and any applicant during formal consultation and the provision to review draft biological opinions, the exchange of information for the development of reasonable and prudent alternatives is sufficient.

The proposed rule stated that the 45-day deadline for delivery of the final biological opinion would be suspended while the Federal agency retained the draft opinion. Several commenters complained that such a suspension would violate the statutory deadlines for concluding formal consultation and that the applicant would be powerless to force an end to the consultation. Although the proposed rule provided

that, "[i]f the draft biological opinion is not returned to the Service within a reasonable period of time, the Service will issue a final biological opinion," the Service agrees that the meaning of "a reasonable period of time" requires clarification. Therefore, to accommodate these comments, the Service now requires the Federal agency to secure the applicant's written consent to an extension for a specified time period if the 45-day deadline is to be suspended while the draft opinion is under review. If no extension is agreed to, the biological opinion will be issued within 45 days of the conclusion of formal consultation.

Another commenter suggested that the Service be required to deliver its biological opinion within the Federal agency's NEPA timeframe so that the biological opinion can be included without delaying the release of the agency's NEPA document. The Service will attempt to coordinate all environmental reviews with the consultation. However, special timing problems under other Federal statutes, or failure to enter into the consultation process early in the planning stage of an action, is not a justification for altering the required timeframe established under the Act. If a particular Federal agency needs special procedures to handle its consultation responsibilities, the Service urges the development of counterpart regulations under § 402.04.

Paragraph (g) has also been modified to reflect that the Service, in formulating its biological opinion, any reasonable and prudent alternatives, and any reasonable and prudent measures, will use the best scientific and commercial data available and will give appropriate consideration to any beneficial actions taken by the Federal agency or applicant including any actions taken prior to the initiation of consultation.

Paragraph (h) of § 402.14, which deals with the contents of a biological opinion, is adopted with minor, technical corrections from proposed § 402.15 (g)-(h). The final rule distinguishes that information or material which will be included in a biological opinion from that which will be provided with a biological opinion.

The biological opinion will include: (1) a summary of the information on which the opinion is based; (2) a detailed discussion of the effects of the action on listed species or critical habitat; and (3) the Service's opinion as to whether the action is likely to jeopardize the continued existence of a listed species or result in the destruction or adverse modification of critical habitat. The biological opinion will conclude that either: (1) the action is not likely to jeopardize the continued existence of listed species or result in the destruction or adverse modification of critical habitat (a "no jeopardy" biological opinion), or (2) the action is likely to jeopardize the continued existence of listed species or result in the destruction or adverse modification of critical habitat (a "jeopardy" biological opinion).

If a "jeopardy" biological opinion is issued, the Service must identify and include reasonable and prudent alternatives, if any, that will avoid jeopardy and that the Federal agency or applicant can implement. If the Service is unable to develop reasonable and prudent alternatives, it will indicate that, to the best of its knowledge, there are no such alternatives that would satisfy the standard of section 7(a)(2).

Paragraph (i) of § 402.14, which governs incidental taking under section 7(b)(4) of the Act, is adopted essentially as proposed in § 402.15. This paragraph is included in the formal consultation section of the final rule because of the direct relationship between final biological opinions and incidental take statements.

The 1982 Amendments changed section 7(b) to include provisions concerning incidental taking of species. The new provisions included in sections 7(b)(4) and 7(o)(2) of the Act are designed to resolve the situation where a Federal agency or an applicant has been advised, through a biological opinion, that the proposed action or the adoption of the reasonable and prudent alternative(s) will not violate section 7(a)(2) of the Act, but the proposed action (or adopted alternative) will result in taking individuals of a listed species incidental to the action. The new provision states that, if the action complies with specified terms and conditions, the resulting incidental take will not be a violation of any "taking" prohibitions established by section 4(d) or 9(a)(1) of the Act.

As noted in the public comments, the availability of an "incidental" taking exemption through the section 7 consultation process is a welcome clarification made by the 1982 Amendments. However, many commenters requested additional guidance on this subject, and several felt that the proposed rule was cumbersome and burdensome. The Service believes that the following discussion will clarify the incidental take provision and explain the incentives for compliance with sections 7(a)(2) and 7(b)(4) of the Act.

If an agency action receives a "no jeopardy" biological opinion, or if the Federal agency adopts any reasonable and prudent alternative provided in a "jeopardy" biological opinion, then the action may proceed in compliance with section 7. An incidental take statement will be provided with the biological opinion when the activity may incidentally take individuals of a listed species but not so many as to jeopardize their continued existence. If the action proceeds in compliance with the terms and conditions of the incidental take statement, then any resulting incidental takings are exempt from the prohibitions of section 4(d) or 9 of the Act. No permit is required of the Federal agency or any applicant in carrying out the action, as one commenter contended. The biological opinion, plus the incidental take statement, operate as an exemption under section 7(o)(2) of the Act. However, this exemption is limited to actions taken by the Federal agency or applicant that comply with the terms and conditions specified in the incidental take statement. Compliance with these terms and conditions is mandatory to qualify for the exemption from section 4(d) or 9 of the Act. "Actions that are not in compliance with the specified measures . . . remain subject to the prohibition against taking that is contained in section 9." S. Rep. No. 418, 97th Cong., 2d Sess. 21 (1982). Therefore, the Service cannot make these terms discretionary, as urged by one commenter.

Paragraph (i)(1) states that, where incidental takings may occur, the Service will provide with the biological opinion to the Federal agency and applicant a written statement that: (i) specifies the impact, *i.e.*, amount or extent, of such anticipated incidental take of the species that does not violate section 7(a)(2), (ii) specifies those reasonable and prudent measures necessary or appropriate to minimize such impact, (iii) sets forth the terms and conditions, including, but not limited to, reporting requirements, that must be complied with by the Federal agency or any applicant in order to implement the reasonable and prudent measures specified under (ii) above, or (iv) specifies the procedures to be used to handle or dispose of any individuals of a species actually taken. Several comments were received on these elements of the incidental take statement.

Because, in some cases, exact numerical limits on the amount of permissible incidental taking will be difficult to determine, the Service may in accordance with (i)(1)(i), specify the extent of anticipated take that will not violate section 7(a)(2) of the Act. The impact of a particular action may only

be predictable in terms of the extent of land or marine area that may be affected. Precise numbers of individuals that may be taken are preferable to descriptions of the extent of disruption and will be provided when they can be computed. However, the Service reserves the flexibility in the rule so that the most appropriate standard for an individual consultation can be used. The Service declines to endorse the use of numerical amounts in all cases over the use of descriptions of extent, because for some species loss of habitat resulting in death or injury to individuals may be more deleterious than the direct loss of a certain number of individuals. Likewise, the Service declines to incorporate into the final rule the comment that would focus take levels on population numbers and recovery plan guidelines, if available. One commenter suggested that two figures or levels be specified: "the expected and the acceptable amount or extent" of take. This approach offers the benefit of giving a "caution" signal to Federal agencies or applicants as they approach a possible problem with the incidental takings resulting from the action. Steps could be taken to correct the course of the action before the threshold of reinitiation (level of maximum anticipated take) is exceeded. The Service recognizes the merit of this approach but does not require that it be followed under the final rule because it may not be appropriate for all Federal actions.

Paragraph (i)(1)(ii) states that the incidental take statement shall specify those reasonable and prudent measures necessary to minimize the level of incidental take. For the reasons discussed under the definition of reasonable and prudent measures, the Service has added a new paragraph (i)(2) to the final rule to clarify that reasonable and prudent measures may only involve minor changes that do not alter the basic design, location, duration, or timing of the action. Should the Service believe that the way to minimize the incidental takings is through research, an explanation of how such research will accomplish this will be included. Any research-related reasonable and prudent measure shall be subject to the limitations in paragraph (i)(2).

Paragraph (i)(1)(iii) provides that reporting requirements must be included in the terms and conditions of an incidental take statement. As explained in paragraph (i)(3), these reporting requirements will be tailored to the nature of the particular Federal action and will, to the extent possible, be limited to existing reporting requirements.

Under 50 CFR 13.45 (FWS) and 222.23(d) (NMFS), there are provisions concerning reporting requirements for any taking of threatened or endangered species. These reporting requirements are not limited to annual reports, and may vary in accordance with the particular needs of the species as set forth in the incidental take statement. Congress did not prohibit the imposition of new reporting requirements, contrary to the assertion of one commenter.

Another commenter said that the disposal procedures in item (i)(1)(iv) should refer to "specimens" taken, not to species taken. The Service has accommodated the commenter's concern by inserting "individuals of a species" in item (iv).

Paragraph (i)(4) requires the Federal agency or the applicant to immediately request reinitiation of formal consultation if the specified amount or extent of incidental take is exceeded. One commenter argued that the Service is allowing the "jeopardy" ceiling to be exceeded in (i)(4). The Service disagrees; however, the Service agrees that the amount or extent of take should not be set at the threshold of likely jeopardy. If the establishment of such a high taking level were necessary to cover all impacts of a proposed action, it is questionable whether the issuance of a "no jeopardy" opinion is appropriate. It is not expected that the level of incidental take anticipated for most "no jeopardy" actions would come close to the section 7(a)(2) barrier.

Congress recognized this in the House Report to the 1982 Amendments:

> If the specified impact on the species is exceeded, the Committee expects that the Federal agency or permittee or licensee will immediately reinitiate consultation since the level of taking exceeds the impact specified in the initial section 7(b)(4) statement. In the interim period between the initiation and completion of the new consultation, the Committee would not expect the Federal agency or permittee or licensee to cease all operations unless it was clear that the impact of the additional taking would cause an irreversible and adverse impact on the species.
>
> H.R. Rep. No. 567, 97th Cong., 2d Sess. 27 (1982). Exceeding the level of anticipated taking does not, by itself, require the stopping of an ongoing action during reinitiation of consultation. The Federal agency must make this ultimate decision, taking into consideration the prohibitions of sections 7(a)(2) and 7(d). Further, the Service will enforce the taking prohibitions of section 4(d) or 9 if the continuation of an action, after the anticipated level of incidental take has been reached, results in additional takings of listed species.

This provision for incidental take in no way affects a Federal agency's responsibility under section 7(a)(2) to ensure that its action is not likely to jeopardize the continued existence of a listed species or result in the destruction or adverse modification of critical habitat. The Service agrees with one commenter that the basis for the conclusion that incidental take will not violate section 7(a)(2) should be included with the biological opinion.

Paragraph (j) specifies that the Service may provide any conservation recommendations with the biological opinion. Several commenters objected to the inclusion of conservation recommendations in the biological opinion, and questioned whether these recommendations were to have binding force. The comment submitted by the House Committee summarized these concerns:

> While the proposed regulations conform to the statute regarding the recommending of "reasonable and prudent alternatives" only where jeopardy is found, they also inject a totally new concept referred to as "conservation recommendations." Although we do not argue with the appropriateness of wildlife agencies recommending measures that could be taken to lessen a project's impact on endangered or threatened species, it should be made clear in the regulations that failure to abide by these recommendations does not result in a violation of section 7(a)(2) of the Act. In addition, while the language of section 7(a)(1) does direct all Federal agencies to "utilize their authorities in furtherance of the purposes of [the Act] by carrying out programs for the conservation of endangered species and threatened species", we do not believe that it was intended that section 7(a)(1) require developmental agency actions to be treated as conservation programs for endangered or threatened species. We also do not believe that all of the conservation recommendations of the Secretary have to be followed for this requirement to be met. Such an interpretation would render the much debated provisions of section 7(a)(2) redundant and essentially meaningless and bring about endless litigation.
>
> Accordingly, we suggest that any conservation recommendations be transmitted in action agencies separate from biological opinions and that the regulations state plainly that failure to accept or implement the recommendations does not constitute a violation of section 7 of the Act.

The Service agrees with the Committee's comments and has amended the proposed rule accordingly. Discretionary conservation recommendations will be provided with the biological opinion as a separate statement rather than as an integral part

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of the opinion. In this rule, conservation recommendations [402.14(j)] are discussed separately from biological opinions [402.14(h)]. A sentence has been added at the conclusion of paragraph (j) to emphasize the advisory, non-binding nature of conservation recommendations.

Paragraph (k) of § 402.14, which deals with incremental steps, is adopted with minor, technical changes from proposed § 402.15(j)(2). Paragraph (k) applies, at the option of the Federal agency, in situations where a statute authorizes the Federal action to be taken in incremental steps. Such circumstances existed in *North Slope Borough* v. *Andrus*, 642 F.2d 589 (D.C. Cir. 1980), involving development of oil and gas resources on the OCS and possible impacts to the bowhead whale. In view of this decision, these regulations provide that a Federal agency may proceed with incremental steps toward completion of the entire action if: (1) the biological opinion does not conclude that the incremental step would violate section 7(a)(2); (2) the Federal agency continues consultation with respect to the entire action and obtains biological opinions, as required, for each incremental step; (3) the Federal agency fulfills its continuing obligation to obtain sufficient data upon which to base the final biological opinion on the entire action; (4) the incremental [illegible] does not violate section 7(d) of the Act concerning irreversible or irretrievable commitment of resources; and (5) there is a reasonable likelihood that the entire action will not violate section 7(a)(2) of the Act.

In response to one comment, the Service acknowledges that the incremental step process can only be invoked at the option of the Federal agency, regardless of the Service's preference. If the Federal agency chooses not to use the incremental step process, the Service must render its biological opinion for the entire action.

Several commenters thought that this provision should be deleted. Some thought the subject should be handled through counterpart regulations or limited strictly to Outer Continental Shelf Lands Act cases. Another commenter stated that the incremental step approach is ill-advised because it is difficult to halt a project at its final stage after substantial resources have been invested. Finally, two commenters criticized the approach as a vehicle granting the Service veto power at any stage of the Federal action.

Paragraph (k) is retained in the final rule for several reasons. First, the Service adopts paragraph (k) because it provides a viable consultation approach sanctioned by the court in *North Slope Borough* v. *Andrus*, *supra*. The Service has clarified the final rule to show that it will not deprive a Federal agency of the opportunity to consult on incremental steps if requested. Second, the risk of section 7(a)(2) and 7(d) noncompliance should not be diminished because the incremental step approach is used. Monetary investments or other actions that do not foreclose the adoption of reasonable and prudent alternatives do not violate section 7(d). If a "jeopardy" opinion is issued at any step of the overall action, a prompt remedy can be sought through the exemption procedure. Third, consulting in incremental steps can be a valuable tool for developing information as an action progresses.

Oil and gas development on the OCS is a multistaged, long term action that provides a good example of the utility of an incremental step consultation. The Federal action occurs in discrete stages: the lease sale, exploration activities, and development/production activities. Any analysis of the impacts of development/production would be mere speculation without knowing what tracts will be leased and without the information on the extent of the petroleum reserves discovered during the exploration phase. As the scope and location of the ultimate action is further refined, the Federal agency will have the opportunity to conduct studies designed to determine the effects of that particular action in that particular area.

The Service is sympathetic to the commenter's concern that applicants might face an arduous series of consultations under paragraph (k), whereas a prompt consultation on the entire action would avoid a series of reviews by the Service. The Service reminds applicants that they may, in appropriate instances, avail themselves of the early consultation procedure to obtain a preapplication review of the remaining steps of the Federal action.

Under paragraph (k), biological opinions concluding "no jeopardy," or Service concurrence letters finding that a step "is not likely to adversely affect," must eventually cover each step of the incremental process. This does not mean that separate opinions must be issued for each step—several steps may be covered in one opinion (e.g., OCS leasing and exploration activities)—but instead that each step must eventually satisfy section 7(a)(2) of the Act. A "jeopardy" opinion issued at any stage not only applies to that step but to the entire project as well. Once a "jeopardy" opinion is issued (unless the Federal agency adopts a reasonable and prudent alternative provided by the Service), paragraph (k) is inapplicable and the ordinary consultation process applies, allowing access to the exemption process. The commenter thus contended that this approach is tantamount to a usurpation of Federal agency statutory authority ignores the fact that this process is at the option of the Federal agency and that the net effect of the Service's action is to cause the consultation to revert to a treatment of the action as a whole. The Federal agency may disagree with the Service's "jeopardy" finding, but it cannot continue to consult on an incremental basis on remaining steps in the action.

One commenter insisted that an action can be halted only if new information that was not previously known becomes available during a late stage of the incremental step consultation. However, the Service's responsibility to determine "jeopardy" or "no jeopardy" places no weight on when, where, or how data that is of compelling force in its analysis were developed. The Service cannot ignore data and permit a listed species to become jeopardized because someone "missed" a piece of information during an earlier step of the consultation. One of the criteria for reinitiation of formal consultation is whether new information reveals effects of the action that may affect a listed species or critical habitat in a manner or to an extent not previously considered. Therefore, incremental step consultations are not the only consultations subjected to this requirement.

Finally, one commenter objected to the requirement for obtaining sufficient data, noting an alleged absence of statutory authority. Again, paragraph (k) is not a creature of statute, but instead was developed so that consultations could be initiated and focused on a step-by-step review of segmented Federal actions—especially those where, in the absence of additional information, the final determination of "likely jeopardy" for the entire action would be highly speculative if consultation were not limited to the initial step or steps. The development of sufficient information crucial to the ultimate success of the incremental step process, and, therefore cannot be eliminated from the rule. The Federal agency must have sufficient information to show that its action is likely to jeopardize the continued existence of listed species or result in the destruction or adverse modification of critical habitat.

Section 402.14(l) covers the termination of formal consultation. Adopted from proposed § 402.15(l)(2), paragraph (l) was retained in the sec

on formal consultation because § 402.14 is the primary mandatory procedure of Part 402.

The proposed rule provided that consultation terminated with the issuance of a "no jeopardy" opinion unless further discussion took place, and, if a "jeopardy" opinion was issued, consultation terminated with the Service's receipt of the Federal agency's decision on the action. This notice requirement was criticized by several commenters as unnecessary and as extending consultation beyond the legal timeframe. As discussed under the "Definitions" section above, further discussion has been deleted as a formal step in the consultation process. Further, to accommodate the concerns, consultation terminates with the issuance of the biological opinion, whether "jeopardy" or "no jeopardy." However, the Service believes that the Federal agency notice of final action with respect to "jeopardy" opinions represents a minimal burden and has retained it under § 402.15—"Responsibilities of Federal agency following issuance of a biological opinion." The Service agrees that a copy of the NEPA record of decision would meet the notice provisions of § 402.15(b); the Service disagrees that this approach causes problems with NEPA compliance.

Finally, one commenter suggested that written notice be required to terminate consultation if a Federal agency or applicant decides to cancel plans for the action that is the subject of the consultation. The Service agrees that a written notice of termination is preferred, and has adopted the commenter's suggestion in paragraph (b)(2).

Section 402.15 Responsibilities of Federal Agency Following Issuance of a Biological Opinion

Following the receipt of the Service's biological opinion, the Federal agency will make its final decision on the action. Section 402.15 describes the steps that the Federal agency should take after consultation is concluded. Paragraphs (a) and (c) of this section are adopted substantially without change from proposed § 402.17. Paragraph (b) is adopted from proposed § 402.15(i)(3) (last sentence).

Several commenters asked that the Federal agency be required to provide a statement of its reasons if it has chosen to disregard the Service's biological opinion. The Service declines to implement this request, because it remains the responsibility of each Federal agency to insure that it is in compliance with section 7(a)(2) and that it has established an administrative record for a given activity which demonstrates such compliance.

Federal courts have accorded Service biological opinions great deference. It, therefore, is incumbent upon a Federal agency to articulate in its administrative record its reasons for disagreeing with the conclusions of a biological opinion. But this is a matter which is primarily controlled under the provisions and judicial interpretations of the Administrative Procedure Act, not these regulations. Thus, the requested modification would add nothing that is not already required as a matter of administrative law.

Paragraph (c) points out the availability of an exemption process if the Federal agency determines that its proposed action cannot comply with section 7(a)(2). Although not covered in § 402.15, the applicant may also pursue an exemption if it receives a final denial of its application as a result of a "jeopardy" biological opinion. The Service disagrees with one commenter that the applicant may seek an exemption if the Federal agency issues the permit or license with conditions related to section 7 considerations. The Act requires a final agency denial, and the issuance of a "jeopardy" biological opinion on the action, as predicates for an applicant's entry into the exemption process. See sections 3(12) and 7(g)(1) of the Act.

Section 402.16 Reinitiation of Formal Consultation.

Reinitiation of formal consultation is required in certain instances as specified in § 402.16. The reinitiation requirement applies only to actions that remain subject to some Federal involvement or control. In the case where a permit or license has been granted, reinitiation would not be appropriate unless the permitting or licensing agency retained jurisdiction over the matter under the terms of the permit or license or as otherwise authorized by law.

In response to one comment, the Service notes its lack of authority to require Federal agencies to reinitiate consultation if they choose not to do so. Nevertheless, the Service shall request reinitiation when it believes that any condition described in this section applies.

Pursuant to several public comments, several minor changes have been made to § 402.16 (proposed § 402.18). Proposed paragraph (a), dealing with nonconfirmation of preliminary biological opinions, was deleted since it is more properly covered in the discussion of early consultation. The standard for reinitiation on incidental take statements is clarified in new paragraph (a). Paragraph (c) is clarified to show that changes to the action that do not cause effects different from or additional to those considered in the biological opinion will not require reinitiation of formal consultation.

Summary

The Amendments made significant changes in the consultation requirements of section 7, and the Service believes that a consistent response by the Federal agencies to those Amendments, as implemented by this final rule, will facilitate successful compliance with section 7 of the Act. The Service believes that these regulations will serve as an effective tool for the early resolution of potential conflicts involving listed species.

The primary authors of this final rule are Michael Young and Nancy Sweeney, Department of the Interior; Patricia Carter, Patricia Montania, and Michael Gosliner, Department of Commerce.

The Department of the Interior, as lead agency in the development of these regulations, has prepared an environmental assessment in conjunction with this rulemaking. On the basis of the environmental assessment, it has been determined that this is not a major Federal action significantly affecting the quality of the human environment within the meaning of section 102(2)(C) of the National Environmental Policy Act of 1969 (implemented at 40 CFR Parts 1500-1508). Therefore, an environmental impact statement need not be prepared. These procedural regulations simply provide a uniform approach for consultation required by section 7 of the Act. Compliance with the procedures in these regulations will not have any significant, direct, or indirect adverse environmental impact. It also has been determined that these regulations do not constitute major rules as defined in Executive Order 12291. The Department of the Interior has certified, under the terms of the Regulatory Flexibility Act (5 U.S.C. 601), that these regulations will not have a significant economic impact on a substantial number of small entities. The regulations are directed at Federal actions. The costs to small entities are those involved with timing and data gathering, if requested by the Federal agency. Even if the costs were passed on, the analysis under the Regulatory Flexibility Act has concluded that they are not substantial. The Department has determined that these rules do not contain "collection of information" or recordkeeping

requirements as defined by the Paperwork Reduction Act. The analyses under Executive Order 12291, the Regulatory Flexibility Act, and NEPA are available to the public at the Office of Endangered Species, U.S. Fish and Wildlife Service, at the address listed above.

List of Subjects in 50 CFR Part 402

Endangered and threatened wildlife, Fish, Intergovernmental relations, Plants (agriculture).

Regulation Promulgation

Accordingly, the Service revises 50 CFR Part 402 to read as follows:

PART 402—INTERAGENCY COOPERATION—ENDANGERED SPECIES ACT OF 1973, AS AMENDED

Subpart A—General

Sec.
402.01 Scope.
402.02 Definitions.
402.03 Applicability.
402.04 Counterpart regulations.
402.05 Emergencies.
402.06 Coordination with other environmental reviews.
402.07 Designation of lead agency.
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Subpart B—Consultation Procedures

402.10 Conference on proposed species or proposed critical habitat.
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402.12 Biological assessment.
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402.14 Formal consultation.
402.15 Responsibilities of Federal agency following issuance of a biological opinion.
402.16 Reinitiation of formal consultation.

Authority: 16 U.S.C. 1531 *et seq.*

Subpart A—General

§ 402.01 Scope.

(a) This Part interprets and implements sections 7(a)–(d) [16 U.S.C. 1536(a)–(d)] of the Endangered Species Act of 1973, as amended ("Act"). Section 7(a) grants authority to and imposes requirements upon Federal agencies regarding endangered or threatened species of fish, wildlife, or plants ("listed species") and habitat of such species that has been designated as critical ("critical habitat"). Section 7(a)(1) of the Act directs Federal agencies, in consultation with and with the assistance of the Secretary of the Interior or of Commerce, as appropriate, to utilize their authorities to further the purposes of the Act by carrying out conservation programs for listed species. Such affirmative conservation programs must comply with applicable permit requirements (50 CFR Parts 17, 220, 222, and 227) for listed species and should be coordinated with the appropriate Secretary. Section 7(a)(2) of the Act requires every Federal agency, in consultation with and with the assistance of the Secretary, to insure that any action it authorizes, funds, or carries out, in the United States or upon the high seas, is not likely to jeopardize the continued existence of any listed species or result in the destruction or adverse modification of critical habitat. Section 7(a)(3) of the Act authorizes a prospective permit or license applicant to request the issuing Federal agency to enter into early consultation with the Service on a proposed action to determine whether such action is likely to jeopardize the continued existence of listed species or result in the destruction or adverse modification of critical habitat. Section 7(a)(4) of the Act requires Federal agencies to confer with the Secretary on any action that is likely to jeopardize the continued existence of proposed species or result in the destruction or adverse modification of proposed critical habitat. Section 7(b) of the Act requires the Secretary, after the conclusion of early or formal consultation, to issue a written statement setting forth the Secretary's opinion detailing how the agency action affects listed species or critical habitat. Biological assessments are required under section 7(c) of the Act if listed species or critical habitat may be present in the area affected by any major construction activity as defined in § 404.02. Section 7(d) of the Act prohibits Federal agencies and applicants from making any irreversible or irretrievable commitment of resources which has the effect of foreclosing the formulation or implementation of reasonable and prudent alternatives which would avoid jeopardizing the continued existence of listed species or resulting in the destruction or adverse modification of critical habitat. Section 7(e)–(o)(1) of the Act provide procedures for granting exemptions from the requirements of section 7(a)(2). Regulations governing the submission of exemption applications are found at 50 CFR Part 451, and regulations governing the exemption process are found at 50 CFR Parts 450, 452, and 453.

(b) The U.S. Fish and Wildlife Service (FWS) and the National Marine Fisheries Service (NMFS) share responsibilities for administering the Act. The Lists of Endangered and Threatened Wildlife and Plants are found in 50 CFR 17.11 and 17.12 and the designated critical habitats are found in 50 CFR 17.95 and 17.96 and 50 CFR Part 226. Endangered or threatened species under the jurisdiction of the NMFS are located in 50 CFR 222.23(a) and 227.4. If the subject species is cited in 50 CFR 222.23(a) or 227.4, the Federal agency shall contact the NMFS. For all other listed species the Federal Agency shall contact the FWS.

§ 402.02 Definitions.

"Act" means the Endangered Species Act of 1973, as amended, 16 U.S.C. 1531 *et seq.*

"Action" means all activities or programs of any kind authorized, funded, or carried out, in whole or in part, by Federal agencies in the United States or upon the high seas. Examples include, but are not limited to: (a) actions intended to conserve listed species or their habitat; (b) the promulgation of regulations; (c) the granting of licenses, contracts, leases, easements, rights-of-way, permits, or grants-in-aid; or (d) actions directly or indirectly causing modifications to the land, water, or air.

"Action area" means all areas to be affected directly or indirectly by the Federal action and not merely the immediate area involved in the action.

"Applicant" refers to any person, as defined in section 3(13) of the Act, who requires formal approval or authorization from a Federal agency as a prerequisite to conducting the action.

"Biological assessment" refers to the information prepared by or under the direction of the Federal agency concerning listed and proposed species and designated and proposed critical habitat that may be present in the action area and the evaluation potential effects of the action on such species and habitat.

"Biological opinion" is the document that states the opinion of the Service as to whether or not the Federal action is likely to jeopardize the continued existence of listed species or result in the destruction or adverse modification of critical habitat.

"Conference" is a process which involves informal discussions between a Federal agency and the Service under section 7(a)(4) of the Act regarding the impact of an action on proposed species or proposed critical habitat and recommendations to minimize or avoid the adverse effects.

"Conservation recommendations" are suggestions of the Service regarding discretionary measures to minimize or avoid adverse effects of a proposed action on listed species or critical habitat or regarding the development of information.

"Critical habitat" refers to an area designated as critical habitat listed in 50 CFR Parts 17 or 226.

"Cumulative effects" are those effects of future State or private activities, not involving Federal activities, that are reasonably certain to occur within the action area of the Federal action subject to consultation.

"Designated non-Federal representative" refers to a person designated by the Federal agency as its representative to conduct informal consultation and/or to prepare any biological assessment.

"Destruction or adverse modification" means a direct or indirect alteration that appreciably diminishes the value of critical habitat for both the survival and recovery of a listed species. Such alterations include, but are not limited to, alterations adversely modifying any of those physical or biological features that were the basis for determining the habitat to be critical.

"Director" refers to the Assistant Administrator for Fisheries for the National Oceanic and Atmospheric Administration, or his authorized representative; or the Fish and Wildlife Service regional director, or his authorized representative, for the region where the action would be carried out.

"Early consultation" is a process requested by a Federal agency on behalf of a prospective applicant under section 7(a)(3) of the Act.

"Effects of the action" refers to the direct and indirect effects of an action on the species or critical habitat, together with the effects of other activities that are interrelated or interdependent with that action, that will be added to the environmental baseline. The environmental baseline includes the past and present impacts of all Federal, State, or private actions and other human activities in the action area, the anticipated impacts of all proposed Federal projects in the action area that have already undergone formal or early section 7 consultation, and the impact of State or private actions which are contemporaneous with the consultation in process. Indirect effects are those that are caused by the proposed action and are later in time, but still are reasonably certain to occur. Interrelated actions are those that are part of a larger action and depend on the larger action for their justification. Interdependent actions are those that have no independent utility apart from the action under consideration.

"Formal consultation" is a process between the Service and the Federal agency that commences with the Federal agency's written request for consultation under section 7(a)(2) of the Act and concludes with the Service's issuance of the biological opinion under section 7(b)(3) of the Act.

"Incidental take" refers to takings that result from, but are not the purpose of, carrying out an otherwise lawful activity conducted by the Federal agency or applicant.

"Informal consultation" is an optional process that includes all discussions, correspondence, etc., between the Service and the Federal agency or the designated non-Federal representative prior to formal consultation, if required.

"Jeopardize the continued existence of" means to engage in an action that reasonably would be expected, directly or indirectly, to reduce appreciably the likelihood of both the survival and recovery of a listed species in the wild by reducing the reproduction, numbers, or distribution of that species.

"Listed species" means any species of fish, wildlife, or plant which has been determined to be endangered or threatened under section 4 of the Act. Listed species are found in 50 CFR 17.11–17.12.

"Major construction activity" is a construction project (or other undertaking having similar physical impacts) which is a major Federal action significantly affecting the quality of the human environment as referred to in the National Environmental Policy Act (NEPA, 42 U.S.C. 4332(2)(C)).

"Preliminary biological opinion" refers to an opinion issued as a result of early consultation.

"Proposed critical habitat" means habitat proposed in the Federal Register to be designated or revised as critical habitat under section 4 of the Act for any listed or proposed species.

"Proposed species" means any species of fish, wildlife, or plant that is proposed in the Federal Register to be listed under section 4 of the Act.

"Reasonable and prudent alternatives" refer to alternative actions identified during formal consultation that can be implemented in a manner consistent with the intended purpose of the action, that can be implemented consistent with the scope of the Federal agency's legal authority and jurisdiction, that is economically and technologically feasible, and that the Director believes would avoid the likelihood of jeopardizing the continued existence of listed species or resulting in the destruction or adverse modification of critical habitat.

"Reasonable and prudent measures" refer to those actions the Director believes necessary or appropriate to minimize the impacts, i.e., amount or extent, of incidental take.

"Recovery" means improvement in the status of listed species to the point at which listing is no longer appropriate under the criteria set out in section 4(a)(1) of the Act.

"Service" means the U.S. Fish and Wildlife Service or the National Marine Fisheries Service, as appropriate.

§402.03 Applicability.

Section 7 and the requirements of this Part apply to all actions in which there is discretionary Federal involvement or control.

§402.04 Counterpart regulations.

The consultation procedures set forth in this Part may be superseded for a particular Federal agency by joint counterpart regulations among that agency, the Fish and Wildlife Service, and the National Marine Fisheries Service. Such counterpart regulations shall be published in the Federal Register in proposed form and shall be subject to public comment for at least 60 days before final rules are published.

§402.05 Emergencies.

(a) Where emergency circumstances mandate the need to consult in an expedited manner, consultation may be conducted informally through alternative procedures that the Director determines to be consistent with the requirements of sections 7(a)–(d) of the Act. This provision applies to situations involving acts of God, disasters, casualties, national defense or security emergencies, etc.

(b) Formal consultation shall be initiated as soon as practicable after the emergency is under control. The Federal agency shall submit information on the nature of the emergency action(s), the justification for the expedited consultation, and the impacts to endangered or threatened species and their habitats. The Service will evaluate such information and issue a biological opinion including the information and recommendations given during the emergency consultation.

§402.06 Coordination with other environmental reviews.

(a) Consultation, conference, and biological assessment procedures under section 7 may be consolidated with interagency cooperation procedures required by other statutes, such as the National Environmental Policy Act (NEPA) (42 U.S.C. 4321 *et seq.*, implemented at 40 CFR Parts 1500–1508) or the Fish and Wildlife Coordination Act (FWCA) (16 U.S.C. 661 *et seq.*). Satisfying the requirements of these other statutes, however, does not in itself relieve a Federal agency of its

obligations to comply with the procedures set forth in this Part or the substantive requirements of section 7. The Service will attempt to provide a coordinated review and analysis of all environmental requirements.

(b) Where the consultation or conference has been consolidated with the interagency cooperation procedures required by other statutes such as NEPA or FWCA, the results should be included in the documents required by those statutes.

§ 402.07 Designation of lead agency.

When a particular action involves more than one Federal agency, the consultation and conference responsibilities may be fulfilled through a lead agency. Factors relevant in determining an appropriate lead agency include the time sequence in which the agencies would become involved, the magnitude of their respective involvement, and their relative expertise with respect to the environmental effects of the action. The Director shall be notified of the designation in writing by the lead agency.

§ 402.08 Designation of non-Federal representative.

A Federal agency may designate a non-Federal representative to conduct informal consultation or prepare a biological assessment by giving written notice to the Director of such designation. If a permit or license applicant is involved and is not the designated non-Federal representative, then the applicant and Federal agency must agree on the choice of the designated non-Federal representative. If a biological assessment is prepared by the designated non-Federal representative, the Federal agency shall furnish guidance and supervision and shall independently review and evaluate the scope and contents of the biological assessment. The ultimate responsibility for compliance with section 7 remains with the Federal agency.

§ 402.09 Irreversible or irretrievable commitment of resources.

After initiation or reinitiation of consultation required under section 7(a)(2) of the Act, the Federal agency and any applicant shall make no irreversible or irretrievable commitment of resources with respect to the agency action which has the effect of foreclosing the formulation or implementation of any reasonable and prudent alternatives which would avoid violating section 7(a)(2). This prohibition is in force during the consultation process and continues until the requirements of section 7(a)(2) are satisfied. This provision does not apply to the conference requirement for proposed species or proposed critical habitat under section 7(a)(4) of the Act.

Subpart B—Consultation Procedures

§ 402.10 Conference on proposed species or proposed critical habitat.

(a) Each Federal agency shall confer with the Service on any action which is likely to jeopardize the continued existence of any proposed species or result in the destruction or adverse modification of proposed critical habitat. The conference is designed to assist the Federal agency and any applicant in identifying and resolving potential conflicts at an early stage in the planning process.

(b) The Federal agency shall initiate the conference with the Director. The Service may request a conference if, after a review of available information, it determines that a conference is required for a particular action.

(c) A conference between a Federal agency and the Service shall consist of informal discussions concerning an action that is likely to jeopardize the continued existence of the proposed species or result in the destruction or adverse modification of the proposed critical habitat at issue. Applicants may be involved in these informal discussions to the greatest extent practicable. During the conference, the Service will make advisory recommendations, if any, on ways to minimize or avoid adverse effects. If the proposed species is subsequently listed or the proposed critical habitat is designated prior to completion of the action, the Federal agency must review the action to determine whether formal consultation is required.

(d) If requested by the Federal agency and deemed appropriate by the Service, the conference may be conducted in accordance with the procedures for formal consultation in § 402.14. An opinion issued at the conclusion of the conference may be adopted as the biological opinion when the species is listed or critical habitat is designated, but only if no significant new information is developed (including that developed during the rulemaking process on the proposed listing or critical habitat designation) and no significant changes to the Federal action are made that would alter the content of the opinion. An incidental take statement provided with a conference opinion does not become effective unless the Service adopts the opinion once the listing is final.

(e) The conclusions reached during a conference and any recommendations shall be documented by the Service and provided to the Federal agency and to any applicant. The style and magnitude of this document will vary with the complexity of the conference. If formal consultation also is required for a particular action, then the Service will provide the results of the conference with the biological opinion.

§ 402.11 Early consultation.

(a) *Purpose.* Early consultation is designed to reduce the likelihood of conflicts between listed species or critical habitat and proposed actions and occurs prior to the filing of an application for a Federal permit or license. Although early consultation is conducted between the Service and the Federal agency, the prospective applicant should be involved throughout the consultation process.

(b) *Request by prospective applicant.* If a prospective applicant has reason to believe that the prospective action may affect listed species or critical habitat, it may request the Federal agency to enter into early consultation with the Service. The prospective applicant must certify in writing to the Federal agency that (1) it has a definitive proposal outlining the action and its effects and (2) it intends to implement its proposal, if authorized.

(c) *Initiation of early consultation.* If the Federal agency receives the prospective applicant's certification in paragraph (b) of this section, then the Federal agency shall initiate early consultation with the Service. This request shall be in writing and contain the information outlined in § 402.14(c) and, if the action is a major construction activity, the biological assessment as outlined in § 402.12.

(d) *Procedure and responsibilities.* The procedures and responsibilities for early consultation are the same as outlined in § 402.14(c)–(j) for formal consultation, except that all references to the "applicant" shall be treated as the "prospective applicant" and all references to the "biological opinion" or the "opinion" shall be treated as the "preliminary biological opinion" for the purpose of this section.

(e) *Preliminary biological opinion.* The contents and conclusions of a preliminary biological opinion are the same as for a biological opinion issued after formal consultation except that the incidental take statement provided with a preliminary biological opinion does not constitute authority to take listed species.

(f) *Confirmation of preliminary biological opinion as final biological opinion.* A preliminary biological opinion may be confirmed as a

biological opinion issued after formal consultation if the Service reviews the proposed action and finds that there have been no significant changes in the action as planned or in the information used during the early consultation. A written request for confirmation of the preliminary biological opinion should be submitted after the prospective applicant applies to the Federal agency for a permit or license but prior to the issuance of such permit or license. Within 45 days of receipt of the Federal agency's request, the Service shall either: (1) confirm that the preliminary biological opinion stands as a final biological opinion; or (2) if the findings noted above cannot be made, request that the Federal agency initiate formal consultation.

§402.12 Biological assessments.

(a) *Purpose.* A biological assessment shall evaluate the potential effects of the action on listed and proposed species and designated and proposed critical habitat and determine whether any such species or habitat are likely to be adversely affected by the action and is used in determining whether formal consultation or a conference is necessary.

(b) *Preparation requirement.* (1) The procedures of this section are required for Federal actions that are "major construction activities"; provided that a contract for construction was not entered into or actual construction was not begun on or before November 10, 1978. Any person, including those who may wish to apply for an exemption from section 7(e)(2) of the Act, may prepare a biological assessment under the supervision of the Federal agency and in cooperation with the Service consistent with the procedures and requirements of this section. An exemption from the requirements of section 7(a)(2) is not permanent unless a biological assessment has been prepared.

(2) The biological assessment shall be completed before any contract for construction is entered into and before construction is begun.

(c) *Request for information.* The Federal agency or the designated non-Federal representative shall convey to the Director either (1) a written request for a list of any listed or proposed species or designated or proposed critical habitat that may be present in the action area; or (2) a written notification of the species and critical habitat that are being included in the biological assessment.

(d) *Director's response.* Within 30 days of receipt of the notification of, or the request for, a species list, the Director shall either concur with or revise the list or, in those cases where no list has been provided, advise the Federal agency or the designated non-Federal representative in writing whether, based on the best scientific and commercial data available, any listed or proposed species or designated or proposed critical habitat may be present in the action area. In addition to listed and proposed species, the Director will provide a list of candidate species that may be present in the action area. Candidate species refers to any species being considered by the Service for listing as endangered or threatened species but not yet the subject of a proposed rule. Although candidate species have no legal status and are accorded no protection under the Act, their inclusion will alert the Federal agency of potential proposals or listings.

(1) If the Director advises that no listed species or critical habitat may be present, the Federal agency need not prepare a biological assessment and further consultation is not required. If only proposed species or proposed critical habitat may be present in the action area, then the Federal agency must confer with the Service if required under §402.10, but preparation of a biological assessment is not required unless the proposed listing and/or designation becomes final.

(2) If a listed species or critical habitat may be present in the action area, the Director will provide a species list or concur with the species list provided. The Director also will provide available information (or reference thereto) regarding those species and critical habitat, and may recommend discretionary studies or surveys that may provide a better information base for the preparation of an assessment. Any recommendation for studies or surveys is not to be construed as the Service's opinion that the Federal agency has failed to satisfy the information standard of section 7(a)(2) of the Act.

(e) *Verification of current accuracy of species list.* If the Federal agency or the designated non-Federal representative does not begin preparation of the biological assessment within 90 days of receipt of (or concurrence with) the species list, the Federal agency or the designated non-Federal representative must verify (formally or informally) with the Service the current accuracy of the species list at the time the preparation of the assessment is begun.

(f) *Contents.* The contents of a biological assessment are at the discretion of the Federal agency and will depend on the nature of the Federal action. The following may be considered for inclusion:

(1) The results of an on-site inspection of the area affected by the action to determine if listed or proposed species are present or occur seasonally.

(2) The views of recognized experts on the species at issue.

(3) A review of the literature and other information.

(4) An analysis of the effects of the action on the species and habitat, including consideration of cumulative effects, and the results of any related studies.

(5) An analysis of alternate actions considered by the Federal agency for the proposed action.

(g) *Incorporation by reference.* If a proposed action requiring the preparation of a biological assessment is identical, or very similar, to a previous action for which a biological assessment was prepared, the Federal agency may fulfill the biological assessment requirement for the proposed action by incorporating by reference the earlier biological assessment, plus any supporting data from other documents that are pertinent to the consultation, into a written certification that:

(1) The proposed action involves similar impacts to the same species in the same geographic area;

(2) No new species have been listed or proposed or no new critical habitat designated or proposed for the action area; and

(3) The biological assessment has been supplemented with any relevant changes in information.

(h) *Permit requirements.* If conducting a biological assessment will involve the taking of a listed species, a permit under section 10 of the Act (16 U.S.C. 1539) and Part 17 of this Title (with respect to species under the jurisdiction of the FWS) or Parts 220, 222, and 227 of this Title (with respect to species under the jurisdiction of the NMFS) is required.

(i) *Completion time.* The Federal agency or the designated non-Federal representative shall complete the biological assessment within 180 days after its initiation (receipt of or concurrence with the species list) unless a different period of time is agreed to by the Director and the Federal agency. If a permit or license applicant is involved, the 180-day period may not be extended unless the agency provides the applicant, before the close of the 180-day period, with a written statement setting forth the estimated length of the proposed extension and the reasons why such an extension is necessary.

(j) *Submission of biological assessment.* The Federal agency shall

submit the completed biological assessment to the Director for review. The Director will respond in writing within 30 days as to whether or not he concurs with the findings of the biological assessment. At the option of the Federal agency, formal consultation may be initiated under § 402.14(c) concurrently with the submission of the assessment.

(k) *Use of the biological assessment.* (1) The Federal agency shall use the biological assessment in determining whether formal consultation or a conference is required under § 402.14 or § 402.10, respectively. If the biological assessment indicates that there are no listed species or critical habitat present that are likely to be adversely affected by the action and the Director concurs as specified in paragraph (j) of this section, then formal consultation is not required. If the biological assessment indicates that the action is not likely to jeopardize the continued existence of proposed species or result in the destruction or adverse modification of proposed critical habitat, and the Director concurs, then a conference is not required.

(2) The Director may use the results of the biological assessment in (i) determining whether to request the Federal agency to initiate formal consultation or a conference, (ii) formulating a biological opinion, or (iii) formulating a preliminary biological opinion.

§ 402.13 Informal consultation.

(a) Informal consultation is an optional process that includes all discussions, correspondence, etc., between the Service and the Federal agency or the designated non-Federal representative, designed to assist the Federal agency in determining whether formal consultation or a conference is required. If during informal consultation it is determined by the Federal agency with the written concurrence of the Service, that the action is not likely to adversely affect listed species or critical habitat, the consultation process is terminated, and no further action is necessary.

(b) During informal consultation, the Service may suggest modifications to the action that the Federal agency and any applicant could implement to avoid the likelihood of adverse effects to listed species or critical habitat.

§ 402.14 Formal consultation.

(a) *Requirement for formal consultation.* Each Federal agency shall review its actions at the earliest possible time to determine whether any action may affect listed species or critical habitat. If such a determination is made, formal consultation is required, except as noted in paragraph (b) of this section. The Director may request a Federal agency to enter into consultation if he identifies any action of that agency that may affect listed species or critical habitat and for which there has been no consultation. When such a request is made, the Director shall forward to the Federal agency a written explanation of the basis for the request.

(b) *Exceptions.* (1) A Federal agency need not initiate formal consultation if, as a result of the preparation of a biological assessment under § 402.12 or as a result of informal consultation with the Service under § 402.13, the Federal agency determines, with the written concurrence of the Director, that the proposed action is not likely to adversely affect any listed species or critical habitat.

(2) A Federal agency need not initiate formal consultation if a preliminary biological opinion, issued after early consultation under § 402.11, is confirmed as the final biological opinion.

(c) *Initiation of formal consultation.* A written request to initiate formal consultation shall be submitted to the Director and shall include:

(1) A description of the action to be considered;

(2) A description of the specific area that may be affected by the action;

(3) A description of any listed species or critical habitat that may be affected by the action;

(4) A description of the manner in which the action may affect any listed species or critical habitat and an analysis of any cumulative effects;

(5) Relevant reports, including any environmental impact statement, environmental assessment, or biological assessment prepared; and

(6) Any other relevant available information on the action, the affected listed species, or critical habitat.

Formal consultation shall not be initiated by the Federal agency until any required biological assessment has been completed and submitted to the Director in accordance with § 402.12. Any request for formal consultation may encompass, subject to the approval of the Director, a number of similar individual actions within a given geographical area or a segment of a comprehensive plan. This does not relieve the Federal agency of the requirements for considering the effects of the action as a whole.

(d) *Responsibility to provide best scientific and commercial data available.* The Federal agency requesting formal consultation shall provide the Service with the best scientific and commercial data available or which can be obtained during the consultation for an adequate review of the effects that an action may have upon listed species or critical habitat. This information may include the results of studies or surveys conducted by the Federal agency or the designated non-Federal representative. The Federal agency shall provide any applicant with the opportunity to submit information for consideration during the consultation.

(e) *Duration and extension of formal consultation.* Formal consultation concludes within 90 days after its initiation unless extended as provided below. If an applicant is not involved, the Service and the Federal agency may mutually agree to extend the consultation for a specific time period. If an applicant is involved, the Service and the Federal agency may mutually agree to extend the consultation provided that the Service submits to the applicant, before the close of the 90 days, a written statement setting forth:

(1) The reasons why a longer period is required,

(2) The information that is required to complete the consultation, and

(3) The estimated date on which the consultation will be completed.

A consultation involving an applicant cannot be extended for more than 60 days without the consent of the applicant. Within 45 days after concluding formal consultation, the Service shall deliver a biological opinion to the Federal agency and any applicant.

(f) *Additional data.* When the Service determines that additional data would provide a better information base from which to formulate a biological opinion, the Director may request an extension of formal consultation and request that the Federal agency obtain additional data to determine how or to what extent the action may affect listed species or critical habitat. If formal consultation is extended by mutual agreement according to § 402.14(e), the Federal agency shall obtain, to the extent practicable, that data which can be developed within the scope of the extension. The responsibility for conducting and funding any studies belongs to the Federal agency and the applicant, not the Service. The Service's request for additional data is not to be construed as the Service's opinion that the Federal agency has failed to satisfy the information standard of section 7(a)(2) of the Act. If no extension of formal consultation is agreed to, the Director will issue a biological opinion

using the best scientific and commercial data available.

(g) *Service responsibilities.* Service responsibilities during formal consultation are as follows:

(1) Review all relevant information provided by the Federal agency or otherwise available. Such review may include an on-site inspection of the action area with representatives of the Federal agency and the applicant.

(2) Evaluate the current status of the listed species or critical habitat.

(3) Evaluate the effects of the action and cumulative effects on the listed species or critical habitat.

(4) Formulate its biological opinion as to whether the action, taken together with cumulative effects, is likely to jeopardize the continued existence of listed species or result in the destruction or adverse modification of critical habitat.

(5) Discuss with the Federal agency and any applicant the Service's review and evaluation conducted under paragraphs (g)(1)–(3) of this section, the basis for any finding in the biological opinion, and the availability of reasonable and prudent alternatives (if a jeopardy opinion is to be issued) that the agency and the applicant can take to avoid violation of section 7(a)(2). The Service will utilize the expertise of the Federal agency and any applicant in identifying these alternatives. If requested, the Service shall make available to the Federal agency the draft biological opinion for the purpose of analyzing the reasonable and prudent alternatives. The 45-day period in which the biological opinion must be delivered will not be suspended unless the Federal agency secures the written consent of the applicant to an extension to a specific date. The applicant may request a copy of the draft opinion from the Federal agency. All comments on the draft biological opinion must be submitted to the Service through the Federal agency, although the applicant may send a copy of its comments directly to the Service. The Service will not issue its biological opinion prior to the 45-day or extended deadline while the draft is under review by the Federal agency. However, if the Federal agency submits comments to the Service regarding the draft biological opinion within 10 days of the deadline for issuing the opinion, the Service is entitled to an automatic 10-day extension on the deadline.

(6) Formulate discretionary conservation recommendations, if any, which will assist the Federal agency in reducing or eliminating the impacts that its proposed action may have on listed species or critical habitat.

(7) Formulate a statement concerning incidental take, if such take may occur.

(8) In formulating its biological opinion, any reasonable and prudent alternatives, and any reasonable and prudent measures, the Service will use the best scientific and commercial data available and will give appropriate consideration to any beneficial actions taken by the Federal agency or applicant, including any actions taken prior to the initiation of consultation.

(h) *Biological opinions.* The biological opinion shall include:

(1) A summary of the information on which the opinion is based;

(2) A detailed discussion of the effects of the action on listed species or critical habitat; and

(3) The Service's opinion on whether the action is likely to jeopardize the continued existence of a listed species or result in the destruction or adverse modification of critical habitat (a "jeopardy biological opinion"); or, the action is not likely to jeopardize the continued existence of a listed species or result in the destruction or adverse modification of critical habitat (a "no jeopardy" biological opinion). A "jeopardy" biological opinion shall include reasonable and prudent alternatives, if any. If the Service is unable to develop such alternatives, it will indicate that to the best of its knowledge there are no reasonable and prudent alternatives.

(i) *Incidental take.* (1) In those cases where the Service concludes that an action (or the implementation of any reasonable and prudent alternatives) and the resultant incidental take of listed species will not violate section 7(a)(2), the Service will provide with the biological opinion a statement concerning incidental take that:

(i) Specifies the impact, i.e., the amount or extent, of such incidental taking of the species;

(ii) Specifies those reasonable and prudent measures that the Director considers necessary or appropriate to minimize such impact;

(iii) Sets forth the terms and conditions (including, but not limited to, reporting requirements) that must be complied with by the Federal agency or any applicant to implement the measures specified under (ii) above; and

(iv) Specifies the procedures to be used to handle or dispose of any individuals of a species actually taken.

(2) Reasonable and prudent measures, along with the terms and conditions that implement them, cannot alter the basic design, location, scope, duration, or timing of the action and may involve only minor changes.

(3) In order to monitor the impacts of incidental take, the Federal agency or any applicant must report the progress of the action and its impact on the species to the Service as specified in the incidental take statement. The reporting requirements will be established in accordance with 50 CFR 13.45(FWS) and 222.23(d)(NMFS).

(4) If during the course of the action the amount or extent of incidental taking, as specified under paragraph (i)(1)(i) of this Section, is exceeded, the Federal agency must reinitiate consultation immediately.

(j) *Conservation recommendations.* The Service may provide with the biological opinion a statement containing discretionary conservation recommendations. Conservation recommendations are advisory and are not intended to carry any binding legal force.

(k) *Incremental steps.* When the action is authorized by a statute that allows the agency to take incremental steps toward the completion of the action, the Service shall, if requested by the Federal agency, issue a biological opinion on the incremental step being considered, including its views on the entire action. Upon the issuance of such a biological opinion, the Federal agency may proceed with or authorize the incremental steps of the action if:

(1) The biological opinion does not conclude that the incremental step would violate section 7(a)(2);

(2) The Federal agency continues consultation with respect to the entire action and obtains biological opinions, as required, for each incremental step;

(3) The Federal agency fulfills its continuing obligation to obtain sufficient data upon which to base the final biological opinion on the entire action;

(4) The incremental step does not violate section 7(d) of the Act concerning irreversible or irretrievable commitment of resources; and

(5) There is a reasonable likelihood that the entire action will not violate section 7(a)(2) of the Act.

(l) *Termination of consultation.* (1) Formal consultation is terminated with the issuance of the biological opinion.

(2) If during any stage of consultation a Federal agency determines that its proposed action is not likely to occur, the consultation may be terminated by written notice to the Service.

(3) If during any stage of consultation a Federal agency determines, with the concurrence of the Director, that its proposed action is not likely to adversely affect any listed species or critical habitat, the consultation is terminated.

§ 402.15 Responsibilities of Federal agency following issuance of a biological opinion.

(a) Following the issuance of a biological opinion, the Federal agency shall determine whether and in what manner to proceed with the action in light of its section 7 obligations and the Service's biological opinion.

(b) If a jeopardy biological opinion is issued, the Federal agency shall notify the Service of its final decision on the action.

(c) If the Federal agency determines that it cannot comply with the requirements of section 7(a)(2) after consultation with the Service, it may apply for an exemption. Procedures for exemption applications by Federal agencies and others are found in 50 CFR Part 451.

§ 402.16 Reinitiation of formal consultation.

Reinitiation of formal consultation is required and shall be requested by the Federal agency or by the Service, where discretionary Federal involvement or control over the action has been retained or is authorized by law and:

(a) If the amount or extent of taking specified in the incidental take statement is exceeded;

(b) If new information reveals effects of the action that may affect listed species or critical habitat in a manner or to an extent not previously considered;

(c) If the identified action is subsequently modified in a manner that causes an effect to the listed species or critical habitat that was not considered in the biological opinion; or

(d) If a new species is listed or critical habitat designated that may be affected by the identified action.

Dated: December 12, 1985.

William P. Horn,

Assistant Secretary for Fish and Wildlife and Parks.

Dated: January 30, 1986.

William G. Gordon,

Assistant Administrator for Fisheries, National Oceanic and Atmospheric Administration.

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Part X

Department of the Interior

Fish and Wildlife Service

Department of Commerce

National Oceanic and Atmospheric Administration

50 CFR Parts 18, 228, and 402

Incidental Take of Endangered, Threatened and Other Depleted Marine Mammals; Rule

DEPARTMENT OF THE INTERIOR

Fish and Wildlife Service

DEPARTMENT OF COMMERCE

National Oceanic and Atmospheric Administration

50 CFR Parts 18, 228, and 402

RIN 1018-AB06

Incidental Take of Endangered, Threatened and Other Depleted Marine Mammals

AGENCIES: Fish and Wildlife Service (FWS), Interior; National Marine Fisheries Service (NMFS), NOAA, Commerce.

ACTION: Final rule.

SUMMARY: Regulations are issued to implement amendments enacted in 1988 to the Marine Mammal Protection Act of 1972 (MMPA) and Endangered Species Act of 1973 (ESA). These amendments provide a mechanism for allowing certain takings of endangered, threatened and other depleted marine mammals incidental to activities other than commercial fishing operations. Previously, the incidental taking of depleted marine mammals was not allowable under the terms of the MMPA. This rule amends existing procedures governing incidental take authorizations.

EFFECTIVE DATE: October 30, 1989.

FOR FURTHER INFORMATION CONTACT: Patricia Montanio, Protected Species Management Division, Office of Protected Resources and Habitat Programs, National Marine Fisheries Service, 1335 East-West Highway, Silver Spring, MD 20910, 301-427-2322, or Robert Peoples, Division of Fish and Wildlife Management Assistance, U.S. Fish and Wildlife Service, Department of the Interior, Mail Stop—820 Arlington Square, 18th and C Streets, NW., Washington, DC 20240, 703-358-1718.

SUPPLEMENTARY INFORMATION: Proposed regulations on the Incidental Take of Endangered, Threatened and Other Depleted Marine Mammals were published on March 15, 1988 (53 FR 8473-8477). The original May 16 close of the comment period was extended until July 5, 1988 (53 FR 17964-17965). More than 20 entities, including conservation groups, Federal, state and local government agencies, private industry and other interested parties commented on the proposed rule. These comments are summarized along with responses in the discussions below.

General Requirements and Processes

FWS and NMFS share responsibilities under the MMPA (16 U.S.C. 1361 *et seq.*) and ESA (16 U.S.C. 1531 *et seq.*). NMFS is responsible for species of the order Cetacea (whales and dolphins) and the suborder Pinnipedia (seals and sea lions) except walrus. FWS is responsible for the dugong, manatees, polar bear, sea and marine otters and walrus. Depending on the animals involved, the term "Service" used in this document may refer to FWS and/or NMFS.

Section 101(a)(5) of the MMPA allows for the taking of marine mammals incidental to non-commercial fishing activities under certain circumstances; Section 7(b)(4) of the ESA allows, under certain circumstances, for the taking of endangered and threatened species incidental to activities that have Federal involvement or control. If a marine mammal species is listed as endangered or threatened under the ESA, the requirements of both the MMPA and ESA must be met before the incidental take can be allowed.

Summary of Amendments

Prior to amendment, section 101(a)(5) of the MMPA applied only to non-depleted species. Under section 3(1)(C) of the MMPA, all endangered and threatened marine mammals are by definition depleted. Since the more restrictive provisions of the MMPA prevail, the ESA provisions alone could not be used to authorize the incidental taking of endangered or threatened marine mammals.

Public Law 99-659, title IV, section 411 (approved November 14, 1986) amended section 101(a)(5) of the MMPA and made conforming changes to sections 7(b)(4) and 7(o) of the ESA. The primary change was to allow the taking of depleted as well as non-depleted species of marine mammals incidental to specified activities (other than commercial fishing operations) under certain conditions. The amendments also changed some of the conditions under which incidental taking can be allowed.

General Comment: One commenter believed that there should not be any taking, hunting or killing of endangered, threatened or depleted species.

Under the 1986 Amendments, Congress provides an exception for the incidental, but not intentional, taking of small numbers of depleted marine mammals under limited circumstances. Although we anticipate most taking to be by harassment only, the amendment is not limited to non-lethal takings.

MMPA—Section 101(a)(5) Process

Under sections 101(a)(5) of the MMPA, the Service can allow the taking of small numbers of marine mammals incidental to a specified activity (other than commercial fishing) within a specified geographical area. For the Service to consider allowing an incidental taking, a written request for specific regulations must be submitted to the Service containing detailed information on the activity as a whole and impacts of the total potential take. The Service will evaluate the impacts resulting from all persons conducting the specified activity, not just the impacts from one entity's activities. If the Service makes certain findings, specific regulations will be issued that, among other things, establish permissible methods of taking and other means of effecting the least practicable adverse impact on the species. After regulations are issued, individual Letters of Authorization must be obtained from the Service by those conducting the activity.

Procedural regulations implementing this provision of the MMPA are found at 50 CFR 18.27 for FWS and at 50 CFR part 228 for NMFS.

Processing time: In the preamble to the proposed rule, the Service advised requestors that the regulatory process for specific regulations can take a year or more. Many commenters believed this to be excessive resulting in unnecessary time and financial costs to applicants and delayed the identification and development of hydrocarbon resources. Further, two commenters believed that the lengthy review process does not account for the urgency of some situations, such as platform removals for safety or reuse purposes, or operational constraints due to weather and ice conditions in Alaska. They argued that Congress intended that the Service act expeditiously on requests.

The Service will complete the process as quickly as possible and will provide the applicant with a proposed schedule, if requested. Although regulations have been issued in as little as six months, the process generally takes longer because of the time necessary to complete the environmental and regulatory reviews and provide an opportunity for public comment on the proposed rule. Therefore, the Service believes one year is a realistic estimate. Knowing the potential time requirements, applicants can plan their activities accordingly. Since the MMPA process can be conducted simultaneously with other requirements, early initiation of the MMPA process will avoid delaying approval and implementation of specific activities. Once regulations are established governing a specific activity, Letters of

Authorization can be issued quickly and can accommodate specific urgencies.

Comment Periods: Under 50 CFR 228.4(b), NMFS publishes a notice of receipt of request for regulations and solicits information. Public comments are also accepted on the proposed findings and regulations. The FWS, on the other hand, does not require publication of a notice of receipt of request and generally solicits comments only on its proposed findings and regulations (50 CFR 18.27(d)(2)). This is the only difference between NMFS and FWS processes, which is relatively minor reflecting standard agency procedures. Some commenters opposed the initial comment period established by NMFS since it is not mandated under the MMPA or Administrative Procedure Act and could delay issuance of final regulations.

The NMFS approach is consistent with its general approach to regulations—providing the public with an advance notice of a rulemaking where possible. The NMFS believes that the first comment period facilitates gathering all available information prior to developing the required regulatory and environmental analyses and publishing a proposed rule. No minimum time for the initial comment period is established in the NMFS regulations. Therefore, in unusual or critical situations, this comment period could be less than the usual 30 days. In addition, drafting the required environmental and regulatory documents could begin during the comment period, resulting in no significant delay to the process.

Application assistance: Commenters suggested that applicants be encouraged to consult with the Service in preparing a request to identify sources of information and to ensure an adequate request.

The Service agrees, but does not believe that this needs to be stated in the regulations. The Service will assist potential applicants by explaining requirements and identifying sources of information. Potential applicants are encouraged to contact the Service and the Service's Regional Offices for assistance.

Completeness of request: One commenter believed that the Service should be required to determine the completeness of a request within 15 days. If found incomplete, the Service would notify the applicant with an explanation of what is required to make the request complete.

The Service will review requests and notify applicants as soon as practicable of any additional information required. However, information needs (such as the feasibility of implementing certain mitigating measures) may become apparent anytime during the regulatory process. Therefore, the Service reserves the option to request additional information when required, rather than just within the first 15 days.

Denial of requests: Some commenters believed that the regulations should require that denials of requests for specific regulations along with the findings in support of that decision be published and made available to the applicant.

The Service agrees and has added new §§ 18.27(d)(4) and 228.4(d) requiring publication in the Federal Register of any decision to deny a request along with the basis for denying the request.

Required information: One commenter believed that the information required in § 18.27(d) (vi), (vii) and (viii) and § 228.4(a) (8), (10) and (11) dealing with suggested means of mitigating and monitoring impacts should be optional, since these discussions would be more productive after the applicant has an opportunity to consult with the Service and subsistence users.

The Service believes the applicant should be required to identify mitigating measures and ways to monitor impacts to assist the Service in developing the most workable regulations. The applicant's detailed knowledge of the proposed activity provides a good basis for such initial proposals. Including these suggestions for comment and further discussion as the process continues will serve to enhance and facilitate the process of developing regulations. Therefore, the Service has retained these questions.

Total impacts: One commenter believed that the current reference to "cumulative" impacts in the information required under §§ 18.27(d) and 228.4 should be deleted.

As used in these sections, cumulative impacts was intended to mean the total impacts resulting from the activity as a whole, not just the impacts resulting from one individual's or company's participation. It was not intended to mean the impacts resulting from the activity in conjunction with unrelated ongoing or projected activities (as the term is used under NEPA). Therefore, the word cumulative has been deleted and the sentence clarified to request information on the "activity as a whole, which includes, but is not limited to, an assessment of total impacts by all persons conducting the activity." (See also "Cumulative Impacts" discussion below.)

Burden of proof: In the preamble to the proposed rule, the Service stated that the applicant has the burden to demonstrate, through the best scientific information available, that only a negligible impact is reasonably likely to occur. Commenters suggested that only the best presently available, readily obtainable information should be required in requests, and that applicants should not be required to conduct research if information gaps exist. Commenters also objected to the applicant having the burden to demonstrate negligible impact, and believed it is the responsibility of the Service.

In response to the commenters' concerns, the Service notes that its "best available scientific evidence" standard used to determine the completeness of a request in the MMPA regulations is similar to the "best available scientific and commercial data" standard that is used in the Section 7 (ESA) consultation regulations. Therefore, the Service intends to use the principles described in the following excerpt from the preamble to the consultation regulations when additional data is needed to complete a request for specific regulations under this final rule:

> A Service request for additional data will not be used as a vehicle for burdening applicants with unnecessary studies and inordinate delays * * *. As in the *Pitsenbarger* case [*Roosevelt Campobello International Park Commission* v. *EPA*, 684 F.2d 1041 (1st Cir. 1982)], these requirements will be limited to readily obtainable data that would assist the Service in formulating its biological opinion [under Section 7(b) of the ESA] * * *. [A]s in *Pitsenbarger*, a distinction must be made between requests for special research projects and requests for routine, customary data collection activities.
>
> 51 FR 19926, 19932 (June 3, 1986).

Only the best available information needs to be submitted with a request, and conducting research is not a requirement. The Service believes it is the responsibility of the applicant to provide the required information and to demonstrate negligible impact since the applicant is requesting authority to take the marine mammals and is the beneficiary of such authority. The Service will also consider information submitted by other interested parties or otherwise available. If the information submitted by the applicant together with any other information available to the Service is not sufficient to support a negligible impact finding, regulations cannot be issued. In this case, additional studies may be needed to support a negligible impact finding.

It should also be noted that Congress placed a continuing burden on those operating under the authority of Section 101(a)(5) to "engage in appropriate

research designed to reduce the incidental taking of marine mammals pursuant to the specified activity concerned." H.R. Rep. No. 228, 97th Cong., 1st Sess. 20 (1981).

Placing the burden on the applicant to demonstrate negligible impact is consistent with other take authorizations under the MMPA. Under Section 104(d)(3), permit applicants "must demonstrate to the Secretary that the taking * * * will be consistent with the purposes of this Act and the applicable regulations established under section 103 of this title." In the 1971 House Report, Congress explained this basic concept:

Before any marine mammal may be taken, the appropriate Secretary must first establish general limitations on the taking, and must issue a permit which would allow that taking. In every case, the burden is placed upon those seeking permits to show that the taking should be allowed and will not work to the disadvantage of the species or stock of animals involved. If that burden is not carried—and it is by no means a light burden—the permit may not be issued. The effect of this set of requirements is to insist that the management of the animal populations be carried out with the interests of the animals as the prime consideration.

H.R. Rep. No. 707, 92d Cong., 1st Sess. 16 (1971).

U.S. Citizen: As stated in the preamble to the proposed rule, under section 101(a)(5) of the MMPA only U.S. citizens are eligible to apply for Letters of Authorization. Commenters believed that the definition of U.S. citizens in the regulations is unduly restrictive since it requires that companies or corporations be controlled by U.S. citizens. Commenters pointed out that this is inconsistent with regulatory practice under the Outer Continental Shelf Lands Act (OCSLA) which requires only that the company be organized under the laws of the United States to be considered a U.S. citizen. Commenters believed that Congress intended that all holders of offshore leases be eligible for a small take authorization under the MMPA, and, therefore, the MMPA regulatory definition should be made consistent with the OCSLA definition.

The Service agrees that a change in the definition may be appropriate. However, since this change was not discussed in the proposed rule and is a potentially significant modification, the Service is addressing this issue in a separate proposed rulemaking to avoid delay in publication of this final rule. That proposed rule was published in the Federal Register on August 17, 1989 (54 FR 33948).

Impact on Species or Stock

Before the Service may allow a taking of marine mammals under the authority of section 101(a)(5) of the MMPA, it must find that the total taking expected from the specified activity will have a negligible impact on the species or stock. After a thorough review of the public comments on this issue, the Service adopts its proposed definition of "negligible impact."

Under the Service's regulatory definition, a finding of negligible impact would require that the impact resulting from the specified activity cannot reasonably be expected to, and is not reasonably likely to, adversely affect the species or stock through effects on annual rates of recruitment or survival. The Service believes that this definition of negligible impact follows congressional intent when enacting Public Law 88-555.

Effects on annual rates of recruitment or survival: Several commenters contended that the proposed definition of negligible impact was too lenient because it suggested that only effects on annual rates of recruitment or survival will be considered. The commenters urged the Service to add back to the definition the standards used to determine negligible impact under the 1981 MMPA Amendments—that the impact from the taking had to be "so small, unimportant, or of so little consequence as to warrant little or no attention." 50 CFR 228.3 (1987) (NMFS regulations); accord, *id.* § 18.27(c) (FWS regulations).

The Service, while sympathetic with the concerns expressed by the commenters, believes that the clear congressional intent behind the 1986 Amendments was to alter the standard for determining negligible impact. In addition, the basic amendment to section 101(a)(5) of the MMPA expanded the coverage of this incidental take provision to depleted as well as non-depleted species, requiring a corresponding change in the approach to assessing negligible impact. To capture the intent of the amendment, the Service has adopted, substantially without change, the definition of negligible impact set out in the Senate's "Section-by-Section Analysis." 132 Cong. Rec. S16305 (Oct. 15, 1986).

Species specific factors/indirect effects: Several commenters noted that the factors analyzed to understand the expected impacts will vary widely from species to species. They also stated that a complete assessment of effects must cover the full range of factors that support recruitment and survival, including an assessment of indirect effects on habitat, behavioral patterns, breeding and feeding, and special management considerations (*e.g.*, impacts on recovery plan objectives or other management initiatives).

The Service agrees with these comments. Although the 1986 Amendments deleted the reference to "habitat" from the determination of negligible impact, the stated reason for this change confirms that the factors indicated by the commenters, such as effects on habitat, remain important in the assessment of negligible impact:

A minor impact upon a small segment of habitat might be found to be more than negligible under the prior standard, even if it has no impact upon the overall population utilizing the habitat. But it is also the case that populations could be effected a[d]versely by actions that damage rookeries, mating grounds, feeding areas and areas of similar significance. The Secretary shall take those impacts into accounts [*sic*] when making a "negligible impact" determination under section 101(A)(5)(I) [*sic*]. Because these factors are to be taken into account, in making such a determination, subparagraph (a)(2)(A) of this section deletes the phrase "and its habitat" from subparagraph 5(A)(I) [*sic*] of the MMPA.

132 Cong. Rec. S16305 (Oct. 15, 1986). The Service does not believe that it is necessary to amend the regulatory language to reflect the above factors; it is sufficient to note that the Service will consider these factors when determining negligible impact.

Impact on optimum sustainable population (OSP): An OSP determination is not required to make a negligible impact finding. In the preamble of the proposed rule, the Service provided some illustrative examples of how the negligible impact test would be applied depending on whether the particular marine mammal stock was within or below its OSP range. 53 FR 8473, 8474 (Mar. 15, 1988). Citing the management goal of the MMPA—the maintenance or attainment of an OSP level for each population stock of marine mammals (see sections 2(2) and 2(6) of the MMPA)—the Service set out the following general analytical framework for applying the definition of negligible impact:

If a request for specific regulations under section 101(a)(5) involves potential impacts to a "depleted" population, then a determination of negligible impact can be made only if the permitted activities are not likely to significantly reduce the increase of that population or prevent it from ultimately achieving its OSP; on the other hand, if a "nondepleted" population is involved, then a determination of negligible impact can be made only if the permitted activities are not likely to reduce that population below its OSP.

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53 FR at 8474. The Service provided this proposed analytical framework to elicit public comment so that the final rule could more fully explore the application of the negligible impact test. Since these examples attracted a wide spectrum of views on the basic meaning of the 1986 Amendments and negligible impact, the Service will now clarify the analytical approach it will follow in making this essential finding.

Several commenters, citing the complex and controversial nature of the OSP concept, asserted that OSP should not be used as the framework for determining negligible impact, especially since no mention is made in section 101(a)(5) of OSP. Many of the commenters emphasized that Congress intended a simplified process that focused on impacts on annual rates of recruitment or survival rather than on impacts to OSP. One commenter argued that Congress rejected an analytical approach based on OSP by failing to pass H.R. 1027, 99th Cong., 1st Sess. (1985), which would have authorized incidental takes under the MMPA "if the proposed incidental take would not impede the species' ability to eventually attain its optimum sustainable population." H.R. Rept. No. 124, 99th Cong., 1st Sess. 13 (1985).

The Service notes that H.R. 1027 would have provided an exception to the taking prohibitions of both the ESA and the MMPA through the section 7 consultation process. The rulemaking process of section 101(a)(5) of the MMPA would not have been required. The Service believes that the congressional choice of imposing an additional regulatory process before authorizing the incidental taking of listed marine mammals reflected a concern for the need for more safeguards rather than a concern for simplification.

The Service did not intend, however, to imply that a formal determination of OSP was necessary in order to make the negligible impact finding. Section 101(a)(5)(C)(ii) of the MMPA clearly exempts the issuance of specific regulations from compliance with the formal rulemaking requirements of section 103 of the MMPA. The Service's factual examples illustrating a proposed analytical framework for the determination of negligible impact did not involve the formal determination of OSP. The first example involved depleted populations and how impacts to recruitment rates and survival would be treated: an OSP determination was not needed because one need only establish that the total take would not "significantly reduce the increase of that population" and would not prevent ultimate achievement of OSP. This conceptual framework for depleted species focuses on the absence of "significant" reductions to the rate of long-term population increases and the absence of barriers to the attainment of OSP.

In response to several comments, the Service notes that the same analytical framework for depleted species applies to stocks of unknown status, since it is not OSP that is at issue, but rather that the incidental taking would not prevent the population from attaining or maintaining its OSP.

Therefore, an OSP determination is not necessary in making a negligible impact finding. Qualitative judgments will be made on a case-by-case basis on how the anticipated incidental taking will affect the status and population trends of the species or stocks concerned. Many factors are used in this determination, including, but not limited to, the status of the species or stock relative to OSP (if known), whether the recruitment rate for the species or stock is increasing, decreasing, stable or unknown, the size and distribution of the population, and existing impacts and environmental conditions.

Several commenters concurred with the Service's analytical framework for depleted species, with one commenter stressing the need to ensure that a depleted population will increase toward its OSP at an acceptable rate. However, one commenter stated that the Service's approach was not consistent with section 2(2) of the MMPA, which mandates that "[f]urther measures should be immediately taken to replenish any species or population stock which has already diminished below [its OSP]." Two commenters argued that the only way to satisfy these conservation goals of the MMPA is to establish that the level of incidental take has only a negligible impact on the rate of recovery for the species or stock. Contending that a distinction must be made among stocks that are increasing, decreasing, or stable in the level of recruitment, they stated that a negligible impact should involve effects that do not impede a stock from achieving OSP at the same rate and in the same manner that would occur in the absence of the proposed incidental take.

The Service agrees that distinctions need to be made among stocks that are increasing, decreasing, or stable when determining negligible impact. In order to make a negligible impact finding, the proposed incidental take must not prevent a depleted population from increasing toward its OSP at a biologically acceptable rate. Consistent with this view, the Service believes that insignificant reductions in the rate of the population increase (*i.e.*, net recruitment) do not become significant impacts on a depleted stock because the stock would not increase toward its OSP as rapidly as it would in the absence of the incidental take. To adopt the commenters' formulation, one would have to find that the impacts of incidental take have "no effect" on the rate of population growth for a depleted stock; *i.e.*, there would be "no effect" on the stock's "rate of recovery." The statutory standard does not require that the same recovery rate be maintained, rather that no significant effect on annual rates of recruitment or survival occurs. For stable or declining populations, a finding of negligible impact may be more difficult than for increasing populations. Section 101(a)(5) clearly indicates that some level of adverse effects involving the take of depleted marine mammals can be authorized as long as the impact is "negligible."

The plain language of section 2(2) does not suggest a more stringent standard. That section indicates a concern for the immediate initiation of steps to replenish a depleted species or stock—a concern which is addressed in the Service's analytical framework since significant reductions in recruitment rates are not considered negligible. Further, section 2(2) does not mandate the immediate taking of all steps to attain an OSP level for all depleted stocks; such a reading of the purposes and policies of the MMPA would displace the clear congressional intent behind section 101(a)(5), which was designed to alleviate conflicts, where the impacts are negligible, between activities (other than commercial fishing) that involve the incidental taking of marine mammals and the strict moratorium against taking.

One commenter suggested that a more appropriate standard for determining negligible impact for a depleted stock would be whether the level of incidental taking is likely to substantially reduce the rate of population growth. By substituting "substantial" for the Service's term "significant," the commenter argues that statistically measurable effects would not necessarily cause an applicant to be ineligible for a take under section 101(a)(5). The commenter further recommended that a level of acceptable take—within the range of 10 to 50 percent of annual recruitment—be prescribed in the regulations.

The Service does not share the commenter's concerns. The absence of substantial reductions in population growth does not automatically correspond with a negligible impact; significant adverse effects, although not substantial in nature, can prevent the Service from finding negligible impact. Further, the Service declines to prescribe acceptable taking levels. Such numerical limits would ignore the significant differences in the status and population dynamics among the various marine mammal stocks and the type of taking (*i.e.*, harassment versus mortality) or other impacts. The determination of negligible impact must take into account the status and the particular biological requirements of the species or stock, as well as the effects of the incidental taking on the rate of recruitment.

The second example presented in the preamble of the proposed rule involved the determination of negligible impact with respect to a non-depleted stock of marine mammals. If a particular stock were known to be within its OSP range, then the Service believes a finding of negligible impact can only be made if the permitted activities are not likely to reduce that stock below its OSP. However, not all takings that do not reduce the population below its OSP would be considered negligible.

The Service's analytical framework for non-depleted stocks recognizes that healthy marine mammal populations that have reached an equilibrium level usually experience fluctuations in population numbers within some normal range due to a variety of environmental and biological factors. Such fluctuations may involve short-term population declines that do not pose a risk to the stocks remaining within the limits of OSP. The Service believes that minimal impacts on a healthy stock caused by incidental taking can still be considered negligible if such taking does not cause the population to fluctuate beyond normal limits. In other words, for a population stock that is at its OSP level, slight impacts on the stock resulting from incidental take do not rise to the level of "adverse effects" on annual rates of recruitment or survival if the population stock is maintained at essentially the same level.

One commenter opposed the Service's approach to non-depleted stocks by arguing that it is too permissive. Contending that the Service's analytical framework could allow a stock to be reduced from 85 to 60 percent of carrying capacity in determining negligible impact, the commenter noted that such a significant population decrease would have to be evaluated through the waiver process in section 101(a)(3) of the MMPA.

The Service agrees that the commenter's extreme example would not be eligible for treatment under the "small take" provisions of section 101(a)(5) of the MMPA; such large takes should be instead considered under the waiver procedures in sections 101(a)(3) and 103 of the MMPA. As explained above, the key factor is the significance of the level of impact on rates of recruitment and survival. Only insignificant impacts on long-term population levels and trends can be treated as negligible.

Several commenters stated that the Service's "dual standard" for assessing negligible impact was inappropriate because Congress intended a uniform system.

The Service's examples in the proposed rule were intended to show how a negligible impact finding might be approached in different situations. This is not a dual standard, but, instead, the illustration of how to apply the rule in contrasting fact situations. Again, the formal determination of OSP is not a prerequisite to issuing specific regulations.

Cumulative impacts: In determining impact, the Service must evaluate the "total taking" expected from the specified activity in a specific geographic area. The estimate of total taking involves the accumulation of impacts from all anticipated activities that are expected to be covered by the specific regulations. In other words, the applicant's anticipated taking from its own activities is only one part of the story; the total takings expected from all persons conducting the activities to be covered by the regulations must be determined.

Several commenters asked that the Service clarify the concept of "not" taking" by amending the definition of negligible impact.

The Service declines to do so because it believes that the definition of negligible impact is effective as written since it clearly states the impacts "resulting from the specified activity" as discussed above.

Two commenters asked how to assess the degree of impacts in the situation where, although separate activities by themselves pose negligible impacts, a combination of impacts poses a significant impact on the species or stock.

The Service agrees with the commenters that the impacts of incidental take from successive or contemporaneous activities must be added to the baseline of existing impacts to determine negligible impact. While the impacts of a particular activity may be fairly minor, they may in fact be more than negligible when measured against a baseline that includes a significant existing take of marine mammals from the other activities.

The commenter believed that the regulations should identify an order of priority for various types of taking (*e.g.*, subsistence taking and incidental taking) and describe how allowable takes will be allocated to each type of activity. Another commenter argued that the 1988 Amendments do not establish a priority system for takings, incidental or intentional.

The Service notes that ongoing authorized activities are factored into the baseline of existing impacts to determine negligible impact of a requested activity. To the extent that subsistence is part of the baseline, subsistence takes are accommodated and allocation between subsistence and incidental taking is not necessary.

Some commenters asked the Service to limit the determination of negligible impact to direct impacts of the specified activity and to exclude cumulative effects resulting from future, unrelated activities.

As discussed previously, the Service must look at both direct and indirect effects, but not the cumulative effects, in making findings under section 101(a)(5) of the MMPA concerning negligible impact. The Service will consider cumulative effects that are reasonably foreseeable when preparing its analysis under the National Environmental Policy Act. Additionally, cumulative effects that are reasonably certain to occur and "effects of the action" will be considered in any necessary consultation under section 7(a)(2) of the ESA. 50 CFR 402.02, 402.14(g) (3), (4) (1987); 51 FR 19926, 19932–33 (June 3, 1986) (preamble discussion to the section 7 regulations). In view of the above, the Service does not believe it is necessary to add a discussion on cumulative effects to the definition of negligible impact.

Impact on individuals: As stated in the preamble of the proposed rule, the negligible impact finding is made with respect to impacts to the marine mammal species or stock and not with respect to impacts to individual animals. Some commenters believed that this should be clearly stated in the regulations, rather than just in the preamble.

The Service declines to add a statement to the regulatory definition of negligible impact because the preamble

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discussion and the definition clearly state that only impacts that "adversely affect the species or stock" are considered.

One commenter noted that, in many cases, available scientific information on the size and population dynamics of a particular stock may be inadequate to assess the degree of impacts posed by incidental take. In those cases, the commenter suggested that the Service should assess impacts based upon a consideration of impacts to individual animals.

The Service disagrees. If information is lacking to define a particular population or stock of marine mammal, then impacts resulting from incidental take should be assessed with respect to the species as a whole. *See* 132 Cong. Rec. S16304–05 (Oct. 15, 1986).

Addressing the degree of information needed to assess the impacts of incidental take, one commenter noted that the Service may deny a request for specific regulations only if the record reflects a valid scientific basis for the conclusion that a more than negligible impact would be posed to the overall population.

Although the commenter is correct that the focus should be on impacts to the overall population, the burden will be on both the applicant and the Service to show that information exists in the administrative record to support a negligible impact finding. *See* earlier discussion on "Burden of Proof."

One commenter believed that the use of OSP as described in the preamble to the proposed rule would shift the focus away from consideration of population impacts.

The Service disagrees. As explained earlier, an OSP determination is not required to make a negligible impact finding. The Service will use all available information concerning a population, including its status relative to OSP (if known).

Speculative impacts: A variety of comments were received on the issue of how speculative impacts should be treated in determining negligible impact. Several commenters argued that the regulations should clearly state that speculative or conjectural effects will not be considered in evaluating impacts. One commenter added that negligible impact should be found when the probability of occurrence of an impact is low whereas the potential impact may be significant. However, other commenters, citing the lack of definitive data on the population dynamics of some marine mammal populations, suggested that the Service should err on the side of caution when labeling certain impacts as "speculative" or "conjectural." One commenter stated that the allowance of incidental taking of a depleted species where the impacts of such taking cannot presently be assessed would be in violation of both the MMPA and the ESA.

The Service believes that the discussion regarding speculative impacts in the preamble of the proposed rule accurately interpreted the legislative intent behind the 1986 Amendments:

> If potential effects of a specified activity are conjectural or speculative, a finding of negligible impact may be appropriate. A finding of negligible impact may also be appropriate if the probability of occurrence is low but the potential effects may be significant. In this case, the probability of occurrence of impacts must be balanced with the potential severity of harm to the species or stock when determining negligible impact. In applying this balancing test, the Service will thoroughly evaluate the risks involved and the potential impacts on marine mammal populations. Such determinations will be made based on the best available scientific information.

53 FR at 8474; *accord*, 132 Cong. Rec. S16305 (Oct. 15, 1986). The Service recognizes the tension that exists between development interests and wildlife resource interests when restrictions on development are predicated upon the existence of adverse impacts that are speculative in nature. To resolve these difficult situations, the legislative history of the 1986 Amendments endorsed the use of a balancing approach to weigh the likelihood of occurrence against the severity of the potential impact:

> The degree of certainty of occurrence required in these judgments should be inversely proportional to the resultant harm to the overall population.

132 Cong. Rec. S16305 (Oct. 15, 1986). In applying this balancing test, the Service must, of necessity, evaluate each request for specific regulations on a case-by-case basis.

Impact on Habitat

The amendments deleted the required finding that the specified activity have only a negligible impact upon the marine mammal habitat. Under the previous standard, a minor impact on a small segment of habitat might be found to be more than negligible and the incidental take prohibited even if the overall impact on the species or stock utilizing the habitat was negligible. Nevertheless, impacts on rookeries, mating grounds, feeding areas and areas of similar significance could have adverse effects on the species or stock. As discussed in the "Impacts on Species or Stock" section above, impacts on habitat are part of the consideration in making the finding of negligible impact on the species or stock. Further, even if the impact is determined to be negligible, specific regulations must include measures to ensure the least practicable adverse impact on the habitat.

Definition: Commenters believed that the definition of negligible impact should specify that impacts on habitat will not be considered unless they have a greater than negligible impact on the marine mammal populations as a whole.

The Service believes the definition of negligible impact reflects this and no changes are necessary.

Required information: Since impacts on habitat are considered only in the context of impacts on the species, one commenter believed that the Service should delete the requirement, in a request, for information concerning impacts on habitat (§ 18.27(d) (iv), (v) and 228.4(a) (7), (8)). Commenters also believed that the information required should be restricted to impacts that can be expected to adversely affect the overall population through effects on rates of recruitment or survival or should be restricted to the impacts on existing rookeries, mating grounds, feeding areas, and areas of similar significance.

The Service believes the existing information required should be retained. A description of the impacts on the habitat and the effects of any loss or modification of habitat on the marine mammal populations is needed in the Service's evaluation of negligible impact. If the impacts on habitat are not likely to result in more than a negligible impact on the population, then they will not be a basis for denying a request. However, the Service still has an obligation to require measures to ensure the least practicable adverse impact on the habitat, whether or not it causes more than a negligible impact on the populations, paying particular attention to rookeries, mating grounds, and areas of similar significance.

Relation to critical habitat: Commenters suggested that the preamble clarify that impacts on habitat are considered in the broad biological sense. They stated that effects on critical habitat would be considered in the ESA Section 7 consultation process.

Impacts on the population of the loss or modification of any part of the population's habitat are considered in determining negligible impact. "Critical habitat" is a regulatory determination under the ESA. Section 7 requires that Federal agencies ensure that their activities are not likely to jeopardize the continued existence of endangered or

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threatened species or result in the destruction or adverse modification of their critical habitats. Only impacts on those areas designated as critical habitat are considered in the determination of destruction or adverse modification. However, impacts on the species of the loss or modification of any part of habitat is evaluated in the determination of jeopardy.

Impact on Subsistence Uses

The amendments changed the standard used to evaluate the impact on subsistence uses from "negligible impact" to "not having an unmitigable adverse impact." To determine that an unmitigable adverse impact on subsistence uses exists, two elements must be present. First, the impact resulting from the specified activity must be likely to reduce the availability of the species to a level insufficient for a harvest to meet subsistence needs by (1) causing the marine mammals to abandon or avoid hunting areas, (2) directly displacing subsistence users, or (3) placing physical barriers between the marine mammals and subsistence hunters. Second, it must be an impact that cannot be sufficiently mitigated by other measures to increase the availability of marine mammals to allow subsistence needs to be met.

Those conducting the specified activity, the involved Federal agencies, and the affected subsistence users, are encouraged to meet and develop mutually agreeable conditions which satisfy the operational, scientific or other needs of the activity and the requirements of subsistence users.

Unmitigable adverse impact: One commenter suggested that, consistent with the legislative history of the amendments, the definition of "unmitigable adverse impact" should be clarified to specify that an impact must result from the specified activity rather than from environmental or other factors.

The Service agrees that only impacts on subsistence uses resulting from the specific activity should be considered in determining if an unmitigable adverse impact exists. Environmental and other factors not related to the specific activity are evaluated only in determining existing baseline conditions and availability. Since the regulatory definition clearly states that "unmitigable adverse impact" means an impact "resulting from the specified activity," no changes are warranted.

One commenter suggested that mitigation should not require the elimination of an impact. Rather, reducing the impact such that subsistence needs can be met would be sufficient in the commenter's opinion.

The new standard of "unmitigable adverse impact" does not require the elimination of adverse impacts, only mitigation sufficient to meet subsistence requirements. However, the amendments also require that the specific regulations governing an activity include measures to ensure the least practicable adverse impact on the availability of marine mammals for subsistence uses, even if the activity will not otherwise have an unmitigable adverse impact. Hence, any adverse impacts would have to be mitigated to the extent practicable.

Another commenter stated that to reflect congressional intent, the definition of "unmitigable adverse impact" should specify that animals would have to vacate a hunting area rather than just avoid it. In addition, the number of marine mammals that would have to abandon or avoid a hunting area to constitute an adverse impact should be a criterion in the regulations according to the commenter.

The legislative history of the amendments emphasizes the availability of "sufficient numbers" of marine mammals to meet the subsistence needs of the community. In this context, "vacate" was intended to connote both the temporary and permanent absence of marine mammals from subsistence hunting areas. Hence, the terms "abandon" and "avoid" are more precise than "vacate"—abandonment of habitat involves forsaking an area completely, while avoidance includes temporary absence from or bypassing an a-

...ifying the number, proportion, or some other quantification of animals avoiding or abandoning an area that would constitute an adverse impact is difficult. The value assigned such a criterion would vary depending on the specific circumstances, including actual subsistence needs, the extent of the area avoided by the marine mammals, and whether or not animals remain available in other areas. If appropriate and feasible, such a criterion will be established during the development of specific regulations for an activity. Since it may not be possible to establish such a criterion in all instances, it is not required in these regulations.

Cultural subsistence: A commenter suggested that cultural aspects of dependence on marine mammals should be reflected in the definition of subsistence needs in addition to the nutritional and other physical attributes usually associated with this term. This commenter added that since the cultural significance of subsistence harvests is to a great extent specific to individual communities, the impacts of a specified activity on subsistence uses must be assessed locally.

The finding of an unmitigable adverse impact considers the availability of the species for subsistence needs and is not based on cultural considerations. To the extent that opportunities to meet the subsistence needs of the community remain available, however, many of the cultural dimensions of subsistence use would be accommodated. "Availability" provides opportunities for traditional hunts and for the Native community to transmit its hunting-based culture to each new generation. In keeping with the emphasis in the legislative history, the definition of unmitigable adverse impact has been modified to emphasize "availability." Such emphasis will accommodate many of the cultural dimensions of subsistence uses of marine mammals. Although the amendments changed the standard for evaluating impacts on subsistence uses from "negligible impact" to "unmitigable adverse impact," the availability of marine mammals for subsistence harvest remains a central consideration.

Coordination with subsistence users: A commenter suggested the language from the preamble encouraging the agency, applicant and affected subsistence users to agree upon terms and conditions for activities which satisfy their subsistence, operational, scientific and other needs be incorporated into the regulations.

Such coordination could be effective in identifying and achieving consensus regarding subsistence mitigation measures to be incorporated in specific regulations. For instance, though not required under the regulations, affected native interests and applicants could agree that the availability of marine mammals could be achieved by means other than the traditional distribution of the animals. The Service encourages, and as appropriate will participate in, such cooperative ventures. Language has been added to §§ 18.27(d)(1)(vi) and 228.4(f) to encourage, but not require, such coordination.

Mitigating Measures

The preamble of the proposed rule discussed mitigating measures in three contexts. With regard to negligible impact determinations, if the impact of a specified activity would be rendered negligible by mitigating measures when that requirement would not otherwise be satisfied, the Service may make a negligible impact finding subject to successful implementation of those mitigating measures. In evaluating

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impacts on subsistence uses of marine mammals, the Service must find that the specified activity will not have an unmitigable adverse impact. Finally, the amendments require that specific regulations governing a specified activity include measures to ensure the least practicable adverse impact on the species and its habitat and on the availability of the species for subsistence uses. Mitigating measures are intended to ensure the availability of enough animals to meet subsistence needs and to minimize impacts on the species or stock and subsistence users.

Support mitigating measures: One commenter endorsed the requirement for mitigating measures to reduce the impact of specific activities on marine mammal populations, habitats and subsistence uses to negligible levels. The commenter suggested that if it is determined that mitigating measures have been or could be effective, those measures should be required in specific regulations and as a condition for issuing any Letter of Authorization.

The Service agrees. The regulations require the inclusion of mitigating measures, as appropriate, in specific regulations and as a condition for issuing Letters of Authorization.

Service's responsibility to identify mitigating measures: A commenter suggested that the Service has the responsibility to identify mitigating measures. While the requester and the Service, in many instances, share responsibility for identifying mitigating measures, the commenter argued that the Service is vested with the ultimate responsibility to search for appropriate mitigating measures before denying a request for specific regulations.

The Service disagrees. Since the applicant is most familiar with the nature and extent of the activity contemplated and has the detailed knowledge of possible alternatives to that activity and the impacts on marine mammals, the applicant is in the best position to identify and assess mitigating measures. In addition, as the primary beneficiary of any incidental take authorization, the applicant should be ultimately responsible for identifying such measures. Nevertheless, the Service will consider all available information in assessing the adequacy and effectiveness of measures to mitigate the adverse impacts of the proposed taking and in developing specific regulations.

Required coordination with applicant: To facilitate coordination, a commenter proposed that requesters be advised of any mitigating measures contained in a proposed rule at least 10 days prior to publication in the Federal Register. Under this procedure, if the requester, within 10 days of such notification, finds the mitigating measures to be inappropriate or economically prohibitive, publication may be delayed to communicate these concerns to the Service.

The Service finds it unnecessary to delay the rulemaking process given the requirement for public comment on the proposed rule, including any mitigating measures. In addition, the applicant could always petition for further review.

Letters of Authorization

This rule makes technical modifications to two paragraphs in the existing regulations (50 CFR 18.27(f) and 228.6) related to Letters of Authorization. The changes are intended to make the language in these paragraphs consistent with the new definitions of "negligible impact" and "unmitigable adverse impact" and the use and interpretation of these terms elsewhere in the regulations. Although not discussed in the preamble to the proposed rule, there were several comments related to Letters of Authorization.

Modification of Letters of Authorization: One commenter suggested that the regulations should provide for modification of Letters of Authorization as an alternative to withdrawal or suspension. In particular, it was proposed that these authorization documents should not be suspended unless the Service finds there are no additional or alternative mitigating measures which would alleviate the need for such action.

Current procedures allow the modification of Letters of Authorization to reflect changed conditions through withdrawal and reissuance as long as the incidental take levels or other requirements of the specific regulations are not violated. If Letters of Authorization are withdrawn or suspended on a case basis, a rulemaking to establish new specific regulations can be initiated. In some cases this approach would be preferable since a comprehensive reevaluation would be required on whether the specified activity is still having a negligible impact.

Public comment on emergency withdrawal or suspension of Letters of Authorization: A commenter suggested that the emergency withdrawal or suspension authority in 50 CFR 18.27(f)(3)(i) and 228.6(f) be curtailed by requiring that the Service, based on the best scientific information available, find that there is an immediate and substantial risk to the well-being of the marine mammal populations involved without such emergency action.

Such a finding is, in effect, required under present law and regulations. Moreover, due to the potentially serious consequences of withdrawal or suspension of Letters of Authorization, the Service would make every effort to provide notice and an opportunity where possible for public comment under the provisions of 50 CFR 18.27(f)(3) and 228.6(c). However, if an emergency exists, the Service is required by the provisions of section 101(a)(5)(C)(i) of the MMPA to take appropriate action to protect marine mammals. Hence, the Service must retain authority for emergency withdrawal or suspension to address situations where species or populations would be threatened by lack of prompt action.

ESA—Section 7 Process

As stated above, the regulations governing small takes of marine mammals now include depleted as well as non-depleted marine mammals. Consultation under section 7 of the ESA is also necessary if the issuance of regulations under section 101(a)(5) of the MMPA is a Federal action that involves the incidental taking of endangered or threatened marine mammals. In addition to satisfying the MMPA criteria, incidental take of endangered or threatened species also must comply with section 7 of the ESA.

Under section 7(a)(2) of the ESA, Federal agencies are required to consult with the Service to insure that any action they authorize, fund or carry out is not likely to jeopardize the continued existence of an endangered or threatened species or result in the destruction or adverse modification of critical habitat. Although this consultation is primarily between the Federal agency and the Service, applicants for Federal licenses, permits or funding are encouraged to participate. The Federal agency initiates formal consultation by a written request to the Service that includes detailed information concerning the potential effects of the proposed action. Consultation should be concluded within 90 days.

After consultation, the Service issues its biological opinion which includes an assessment of impacts and its conclusion on whether or not the action is likely to jeopardize the continued existence of endangered or threatened species or result in the destruction or adverse modification of critical habitat. In those cases where the Service concludes that an action (or the

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implementation of reasonable and prudent alternative(s)) is not likely to result in jeopardy or adverse modification but may result in the incidental take of endangered or threatened species, the Service includes an incidental take statement in the biological opinion as required by section 7(b)(4). Compliance with the terms and conditions specified in the incidental take statement exempts the Federal agency and any permit or license applicant involved from the taking prohibitions of the ESA up to the level specified in the incidental take statement.

Coordination Between the ESA and MMPA

One of the purposes of the amendments to the MMPA and the ESA was to clarify the relationship between these statutes so that decision processes under each would be coordinated and integrated to the maximum extent practicable. The ESA alone does not provide authority for the incidental take of endangered or threatened marine mammals—the requirements of both the MMPA and ESA must be met. The incidental take statement issued under the authority of the ESA will include terms and conditions with which a Federal agency or applicant must comply. The amendment added a provision to section 7(b)(4) which directs that the provisions of section 101(a)(5) of the MMPA must be completed before the incidental take of endangered or threatened marine mammals is allowed. In addition to the reasonable and prudent measures to minimize the impact of the incidental take, an incidental take statement will include measures which are required to comply with section 101(a)(5) of the MMPA and applicable regulations. The difficulty of coordinating the ESA consultation and MMPA exemption processes is that section 7(b) of the ESA generally requires that consultation be completed within 90 days while the MMPA regulatory process is much longer.

Delay of section 7 process: One commenter stated that the preamble implied that initiation of section 7 consultation would be delayed until the MMPA process was well underway. They stated that the processes should be conducted simultaneously and that the ESA process should begin immediately upon submission of the MMPA request.

Because of the timing discrepancy between the two processes reflecting procedural differences maintained by Congress, the MMPA section 101(a)(5) process cannot be completed as expeditiously as the ESA process. However, the legislative history offers options on how to handle the timing discrepancies between the two Acts, two of which were summarized in the preamble to the proposed rule. The first is to consider initiating the MMPA section 101(a)(5) process in advance of the ESA section 7 process. In this way, the MMPA requirements can be incorporated into the ESA incidental take statement when the biological opinion is issued and subsequent revisions would not be necessary. Another option is to have the Federal agency and the Service agree to extend the consultation under section 7(b)(1)(A) to accommodate completion of the section 101(a)(5) regulations. The consent of any permit or license applicant is required for an extension of more than 60 days. An additional option involves early consultation under section 7(a)(3) of the ESA. Under this approach, a preliminary biological opinion could be issued on the prospective agency action. When the section 101(a)(5) process is completed, the biological opinion would be reviewed and the ESA section 7(b)(4) incidental take statement amended or added, as appropriate. These, or similar options, will be available to the agency and the applicant as appropriate.

Issuance of incidental take statements: One commenter pointed out the different approaches taken by NMFS and FWS in how they handle the incidental take statements included in the biological opinion, and urged that these regulations established a consistent policy. Another commenter argued that the ESA biological opinion should be completed within the required time limits and the incidental take statement added to the opinion upon completion of the MMPA process.

The Service agrees with these comments and, therefore, in the future, neither agency will issue an incidental take statement in the biological opinion if consultation is completed before the section 101(a)(5) regulations are issued. The biological opinion will later be amended to include the incidental take statement.

One commenter said that section 7 of the ESA requires the timely issuance of biological opinions and incidental take statements.

The Service agrees and will continue to issue biological opinions within the section 7 timeframe. However, the portion of the incidental take statement dealing with marine mammals will be added to the biological opinion after the MMPA requirements have been satisfied.

Section 7(o) of the ESA

Section 7(o) of the ESA, as amended, specifies that any taking in compliance with the terms and conditions of an incidental take statement is not a prohibited taking under the ESA. No other ESA permit or authorization is required of the Federal agency or applicant in carrying out the action if the incidental take statement applies and if the action complies with the terms and conditions of that statement. The biological opinion plus the incidental take statement operate as an exemption under section 7(o)(2) of the ESA. The new § 402.14(i)(5) clarifies this provision.

Private actions: In the preamble to the proposed rule, the Service cited the following example concerning private actions. Section 10(a) of the ESA allows the Service to issue permits for the taking of endangered species incidental to an otherwise lawful non-Federal action within the United States and its territorial sea, subject to certain conditions. In 1982, Congress added this provision to allow incidental taking associated with private actions that are not subject to the section 7 consultation process.

If an endangered or threatened marine mammal may be taken incidentally to a private action, regulations under section 101(a)(5) of the MMPA would be required. Consultation under section 7 of the ESA would be conducted since issuance of the MMPA regulations is a Federal action. The incidental take statement issued with the biological opinion would address taking concerns under the ESA, and a section 10 permit would not be required.

Two commenters disagreed with this interpretation, contending that it would allow wholly non-Federal activities to be relieved of section 10 requirements (except for the necessity of obtaining MMPA incidental taking authority), most notably the conservation plan obligations.

This implies that private activities are subject to stricter protection standards than activities with Federal involvement. This contention misconstrues the purpose and effect of section 10 provisions relating to private actions. These provisions were added by Congress to allow persons engaged in activities with no discretionary Federal involvement the same access to ESA exemptions and provisions as those engaged in activities requiring Federal approval or scrutiny. There is no indication in the ESA or its legislative history that Congress intended to set up substantially different or stricter protection standards for private

activities by requiring a conservation plan. In commenting on the standards to be used in granting section 10 permits for private activities, the House Report states the following:

> The [S]ecretary would base his determination on whether or not to grant the permit under the same standard as found in section 7(a)(2) of the Act, that is, whether or not the taking would jeopardize the continued existence of the species. To issue the permit, the Secretary would also have to find that the taking would be incidental to another activity and that the applicant would minimize the taking to the maximum extent practicable.

H.R. Rep. No. 567, 97th Cong., 2nd Sess. 31 (1982).

Section 7 and section 10 are designed to achieve the same objectives through different procedural means. The conservation plan requirement is the means for ensuring effective and timely Federal involvement in an otherwise private activity. For those activities already subject to such involvement through regulations or permits, there is no need for a separate conservation plan. Under both sections 7 and 10, the endangered and threatened species are afforded the same level of protection.

To require a separate section 10 permit in addition to section 101(a)(5) regulations and a section 7 consultation would serve only to increase the administrative burden on the applicant and the government with no corresponding benefit to endangered or threatened marine species.

Exceeding Take Limits

One commenter suggested that the regulations should specify what will happen when an incidental take level is exceeded, and that this be the same for all incidental take authorizations under both the MMPA and ESA.

The Service agrees that provisions for addressing excessive incidental take should be consistent for authorizations under MMPA regulations and ESA incidental take statements. The MMPA and ESA incidental take processes are similar in that when an incidental take authorization is exceeded, the activity must be reevaluated. However, if the activity continued during such a reevaluation, then any resultant taking would be subject to penalties under the ESA and/or the MMPA.

Under section 7 of the ESA, consultation must be reinitiated immediately by the Federal agency if the incidental take level is exceeded (*see* 50 CFR § 402.14(i)(4)). Exceeding the level of anticipated taking does not, by itself, require the stopping of an ongoing action during reinitiation of consultation. However, any further taking resulting from the activity would be illegal under the ESA. If formal consultation is reinitiated, section 7(d) of the ESA again takes effect. That provision prohibits the Federal agency or applicant from making any irreversible or irretrievable commitment of resources which has the effect of foreclosing the formulation or implementation of any reasonable or prudent alternatives which would avoid violating section 7(a)(2).

The parallel language in section 101(a)(5) of the MMPA requires withdrawal or suspension of Letters of Authorization either on an individual or class basis if, after notice and public comment, it is found that the impact of the authorized incidental take is more than negligible (*see* 50 CFR 18.27(f)(5) and 228.6(e)). The Southern Sea Otter Translocation Project, an issue raised by the commenter, involves a fundamentally different situation in that it is an experimental effort authorized by a special statute and by a scientific research permit.

Sea Otter Management Zone

In 1986, Public Law 99-625 was passed by Congress to govern the translocation of southern sea otters for research and recovery purposes. The FWS has established an experimental population of sea otters around San Nicolas Island, Ventura County, California.

One commenter stated that these regulations should not apply to activities within the management zone for the experimental population of the sea otter.

There are two zones established by the translocation project. The first area is the translocation zone around San Nicolas Island that has a baseline at the 15-fathom isobath with the boundaries extending 10 to 15 nautical miles from the baseline. The second zone surrounds the translocation zone and is an otter-free or management zone, encompassing all marine waters subject to U.S. jurisdiction from Point Conception south.

Within the translocation zone, except for defense-related actions and actions initiated prior to the passage of Public Law 99-625, the consultation provisions of section 7(a)(2) of the ESA and the provisions of the MMPA apply. Within the management zone, unless the proposed action may affect the "parent population" (*see* 50 CFR 17.84(d)(1)(iv)), the provisions of section 7(a)(2) of the ESA and the restrictions on incidental taking under the MMPA do not apply. However, the section 7(a)(4) requirement to confer applies to Federal activities within the management zone and to defense-related activities in either zone.

Regulatory Changes

These regulations amend 50 CFR parts 18, 228 and 402 to implement the 1986 Amendments to section 101(a)(5) of the MMPA and sections 7(b)(4) and 7(o) of the ESA. Basic processes for authorizing incidental take under both ESA and MMPA remain the same; the primary changes are (1) allowing the incidental take of depleted marine mammals, and (2) changing the findings that must be made to allow a take.

Authority citation: Commenters note that the authority citation for 50 CFR part 228 should be 16 U.S.C. 1371(a)(5), rather than the entire MMPA, since the criteria to be considered are entirely within section 101(a)(5).

The Service disagrees. Although the criteria are all contained within section 101(a)(5), the enforcement and penalty provisions of the MMPA also apply to activities conducted under section 101(a)(5).

Classification

The Department of the Interior, as lead agency, has prepared an environmental assessment on this rule. On the basis of this assessment, it has been determined that this is not a major Federal action significantly affecting the quality of the human environment within the meaning of section 102(2)(C) of the National Environmental Policy Act of 1969 (NEPA). Therefore, an environmental impact statement need not be prepared. The regulations are procedural and, by themselves, do not authorize the taking of depleted marine mammals. Issuance of specific regulations under section 101(a)(5) of the MMPA allowing a taking would require compliance with NEPA, including the preparation of a separate environmental assessment or impact statement if required.

NEPA compliance: One commenter believed that the issuance of specific regulations allowing an incidental take should not require the preparation of a separate environmental assessment or impact statement. It was stated that given the thresholds of negligible impact on a species or stock and no unmitigable adverse impact on subsistence users, requests under section 101(a)(5) would appear to qualify for categorical exclusion treatment under the Council for Environmental Quality's regulations and the Service should amend its NEPA regulations accordingly.

Since the Service must analyze the proposal for specific regulations to make the determination that the proposal has only a negligible impact on a species or stock and does not have an unmitigable

adverse impact on subsistence users, the NEPA process will be used to facilitate those determinations. The issuance of specific regulations allowing incidental take would normally only require the preparation of an environmental assessment. Thus, the Service does not believe a categorical exclusion is warranted or that its NEPA regulations need to be amended.

It has been determined that these regulations do not constitute a major rule as defined in Executive Order 12291. The Department of the Interior has certified under the terms of the Regulatory Flexibility Act (5 U.S.C. 601 *et seq.*) that the regulations will not have a significant economic impact on a substantial number of small entities. The amendments of rules governing the take of small numbers of marine mammals incidental to specified activities will have little, if any, economic effect. Direct costs will be those associated with subsequent preparation of applications for "Specific Regulations" and "Letters of Authorization." However, those costs are not likely to approach the $100 million annual threshold for these rules to be considered a major rule in accordance with E.O. 12291. As most of the applicants under the revised rule, as at present, are likely to be oil and gas corporations and their contractors, they would not be considered small entities under the Regulatory Flexibility Act.

The regulations in 50 CFR parts 18 and 228 contain a collection of information requirement subject to Office of Management and Budget (OMB) clearance under the Paperwork Reduction Act (44 U.S.C. 3501 *et seq.*). The information collection requirement in 50 CFR 18.27 is approved under OMB control number 1018-0070 and the information requirement in 50 CFR part 228 is approved under OMB control number 0648-0151. Public reporting burden for this collection of information is estimated to average 80 hours per response, including the time for reviewing instructions, searching existing data sources, gathering and maintaining the data needed, and completing and reviewing the collection of information. Send comments regarding this burden estimate or any other aspect of this collection of information, including suggestions for reducing this burden, to the Office of Protected Resources and Habitat Programs, National Marine Fisheries Service, 1335 East-West Highway, Silver Spring, MD 20910; the Information Collection Clearance Officer, U.S. Fish and Wildlife Service, Department of the Interior, Mail Stop—220 ARLSQ, 18th and C Streets, NW., Washington, DC 20240; and to the Paperwork Reduction Project, Office of Information and Regulatory Affairs, Office of Management and Budget, Washington, DC 20503.

The amendment of part 402 does not contain information collection requirements requiring OMB approval under the Paperwork Reduction Act.

The analyses under NEPA, E.O. 12291 and the Regulatory Flexibility Act are available for review (see FOR FURTHER INFORMATION CONTACT).

The primary authors of this final rule are Robert Peoples, Nancy Sweeney, and Michael Young, Department of the Interior, and Patricia Montanio and Gene Martin, Department of Commerce.

List of Subjects

50 CFR Part 18

Administrative practice and procedure, Alaska, Exports, Imports, Intergovernmental relations, Marine mammals, Transportation.

50 CFR Part 228

Administrative practice and procedure, Marine mammals, Outer continental shelf oil and gas exploration.

50 CFR Part 402

Endangered and threatened wildlife, Fish, Intergovernmental relations, Plants (agriculture).

Regulation Promulgation

Accordingly, the Service amends 50 CFR parts 18, 228 and 402 as shown below.

PART 18—MARINE MAMMALS

1. The authority citation for 50 CFR part 18 is revised to read as follows:

Authority: 16 U.S.C. 1361 *et seq.*

2. In § 18.27, paragraph (a) is amended by removing the words "Pub. L. 97-58" and "non-depleted"; paragraph (b), including the note following that paragraph, is revised; in paragraph (c), the definition of "negligible impact" is revised, the definition of "specified activity" is amended by removing the word "non-depleted" wherever it occurs, and a new definition for "unmitigable adverse impact" is added in alphabetical order; paragraph (d) is amended by removing the word "non-depleted" wherever it appears; the second sentence of the introductory text to paragraph (d)(1) is revised; a sentence is added to the end of paragraph (d)(1)(vi); a new paragraph (d)(4) is added; and paragraphs (d)(3), (e)(1), (f)(2), and (f)(5)(ii) are revised, to read as follows:

§ 18.27 Regulations governing small takes of marine mammals incidental to specified activities.

* * * * * *

(b) *Scope of Regulations.* The taking of small numbers of marine mammals under section 101(a)(5) of the Marine Mammal Protection Act may be allowed only if the Director of the Fish and Wildlife Service (1) finds, based on the best scientific evidence available, that the total taking during the specified time period will have a negligible impact on the species or stock and will not have an unmitigable adverse impact on the availability of the species or stock for subsistence uses; (2) prescribes regulations setting forth permissible methods of taking and other means of effecting the least practicable adverse impact on the species and its habitat and on the availability of the species for subsistence uses, paying particular attention to rookeries, mating grounds, and areas of similar significance; and (3) prescribes regulations pertaining to the monitoring and reporting of such taking.

Note: The information collection requirement contained in this § 18.27 has been approved by the Office of Management and Budget under 44 U.S.C. 3501 *et seq.* and assigned clearance No. 1018-0070. The information is being collected to describe the activity proposed and estimate the cumulative impacts of potential takings by all persons conducting the activity. The information will be used to evaluate the application and determine whether to issue Specific Regulations and, subsequently, Letters of Authorization. Response is required to obtain a benefit.

The public reporting burden from this requirement is estimated to vary from 2 to 200 hours per response with an average of 10 hours per response including time for reviewing instructions, gathering and maintaining data, and completing and reviewing applications for specific regulations and Letters of Authorization. Direct comments regarding the burden estimate or any other aspect of this requirement to the Information Collection Clearance Officer, U.S. Fish and Wildlife Service, Department of the Interior, Mail Stop—220 ARLSQ, 18th and C Streets NW., Washington, DC 20240, and the Office of Management and Budget, Paperwork Reduction Project (Clearance No. 1018-0070), Washington, DC 20503.

(c) * * *

"Negligible impact" is an impact resulting from the specified activity that cannot be reasonably expected to, and is not reasonably likely to, adversely affect the species or stock through effects on annual rates of recruitment or survival.

"Unmitigable adverse impact" means an impact resulting from the specified activity (1) that is likely to reduce the

availability of the species to a level insufficient for a harvest to meet subsistence needs by (i) causing the marine mammals to abandon or avoid hunting areas, (ii) directly displacing subsistence users, or (iii) placing physical barriers between the marine mammals and the subsistence hunters; and (2) that cannot be sufficiently mitigated by other measures to increase the availability of marine mammals to allow subsistence needs to be met.

(d) * * *

(1) * * * Requests shall include the following information on the activity as a whole, which includes, but is not limited to, an assessment of total impacts by all persons conducting the activity:

* * * * *

(vi) * * * [The applicant and those conducting the specified activity and the affected subsistence users are encouraged to develop mutually agreeable mitigating measures that will meet the needs of subsistence users.];

* * * * *

(3) The Director shall evaluate each request to determine, based on the best available scientific evidence, whether the total taking will have a negligible impact on the species or stock and, where appropriate, will not have an unmitigable adverse impact on the availability of such species or stock for subsistence uses. If the Director finds that mitigating measures would render the impact of the specified activity negligible when it would not otherwise satisfy that requirement, the Director may make a finding of negligible impact subject to such mitigating measures being successfully implemented. Any preliminary findings of "negligible impact" and "no unmitigable adverse impact" shall be proposed for public comment along with the proposed specific regulations.

(4) If the Director cannot make a finding that the total taking will have a negligible impact on the species or stock or will not have an unmitigable adverse impact on the availability of such species or stock for subsistence uses, the Director shall publish in the Federal Register the negative finding along with the basis for denying the request.

(e) * * *

(1) Specific regulations will be established for each allowed activity which set forth (i) permissible methods of taking, (ii) means of effecting the least practicable adverse impact on the species and its habitat and on the availability of the species for subsistence uses, and (iii) requirements for monitoring and reporting.

* * * * *

(f) * * *

(2) Issuance of a Letter of Authorization will be based on a determination that the level of taking will be consistent with the findings made for the total taking allowable under the specific regulations.

* * * * *

(5) * * *

(ii) The taking allowed is having, or may have, more than a negligible impact on the species or stock, or where relevant, an unmitigable adverse impact on the availability of the species or stock for subsistence uses.

* * * * *

PART 228—REGULATIONS GOVERNING SMALL TAKES OF MARINE MAMMALS INCIDENTAL TO SPECIFIED ACTIVITIES

3. The authority citation for 50 CFR part 228 is revised to read as follows:

Authority: 16 U.S.C. 1361 *et seq.*

§ 228.1 [Amended]

4. Section 228.1 is amended by removing the words "Pub. L. 97-58" and "non-depleted."

5. Section 228.2 is revised to read as follows:

§ 228.2 Scope.

The taking of small numbers of marine mammals under section 101(a)(5) of the Marine Mammal Protection Act may be allowed only if the National Marine Fisheries Service (a) finds, based on the best scientific evidence available, that the total taking during the specified time period will have a negligible impact on the species or stock and will not have an unmitigable adverse impact on the availability of the species or stock for subsistence uses; (b) prescribes regulations setting forth permissible methods of taking and other means of effecting the least practicable adverse impact on the species and its habitat and on the availability of the species for subsistence uses, paying particular attention to rookeries, mating grounds, and areas of similar significance; and (c) prescribes regulations pertaining to the monitoring and reporting of such taking. The specific regulations governing specified activities are contained in subsequent subparts to this part 228.

6. In § 228.3, the definition of "negligible impact" is revised; the definition of "specified activity" is amended by removing the word "non-depleted" wherever it occurs; and a new definition for "unmitigable adverse impact" is added in alphabetical order, to read as follows:

§ 228.3 Definitions.

* * * * *

"Negligible impact" is an impact resulting from the specified activity that cannot be reasonably expected to, and is not reasonably likely to, adversely affect the species or stock through effects on annual rates of recruitment or survival.

* * * * *

"Unmitigable adverse impact" means an impact resulting from the specified activity (1) that is likely to reduce the availability of the species to a level insufficient for a harvest to meet subsistence needs by (i) causing the marine mammals to abandon or avoid hunting areas, (ii) directly displacing subsistence users, or (iii) placing physical barriers between the marine mammals and the subsistence hunters; and (2) that cannot be sufficiently mitigated by other measures to increase the availability of marine mammals to allow subsistence needs to be met.

7. In § 228.4, paragraph (a)(1) is amended by removing the word "non-depleted"; the second sentence of paragraph (a) introductory text is revised; a sentence is added to the end of paragraph (a)(9); paragraph (c) is revised; and a new paragraph (d) is added, to read as follows:

§ 228.4 Submission of requests.

(a) * * * Requests shall include the following information on the activity as a whole, which includes, but is not limited to, an assessment of total impacts by all persons conducting the activity:

* * * * *

(9) * * * [The applicant and those conducting the specified activity and the affected subsistence users are encouraged to develop mutually agreeable mitigating measures that will meet the needs of subsistence users.];

* * * * *

(c) The Assistant Administrator shall evaluate each request to determine, based on the best available scientific evidence, whether the total taking will have a negligible impact on the species or stock and, where appropriate, will not have an unmitigable adverse impact on the availability of such species or stock for subsistence uses. If the Assistant Administrator finds that mitigating measures would render the impact of the specified activity negligible when it would not otherwise satisfy that requirement, the Assistant Administrator may make a finding of negligible impact subject to such mitigating measures being successfully implemented. Any preliminary findings

of "negligible impact" and "no unmitigable adverse impact" shall be proposed for public comment along with the proposed specific regulations.

(d) If the Assistant Administrator cannot make a finding that the total taking will have a negligible impact on the species or stock or will not have an unmitigable adverse impact on availability of such species or stock for subsistence uses, the Assistant Administrator shall publish in the Federal Register the negative finding along with the basis for denying the request.

8. In § 228.5, paragraph (a) is revised to read as follows:

§ 228.5 Specific regulations.

(a) Specific regulations will be established for each allowed activity which set forth (1) permissible methods of taking, (2) means of effecting the least practicable adverse impact on the species and its habitat and on the availability of the species for subsistence uses, and (3) requirements for monitoring and reporting.

• • • • •

9. In § 228.6, paragraphs (b) and (e)(2) are revised to read as follows:

§ 228.6 Letters of Authorization.

• • • • •

(b) Issuance of a Letter of Authorization will be based on a determination that the level of taking will be consistent with the findings made for the total taking allowable under the specific regulations.

• • • • •

(e) • • •

(2) the taking allowed is having, or may have, more than a negligible impact on the species or stock, or, where relevant, an unmitigable adverse impact on the availability of the species or stock for subsistence uses.

• • • • • • • • •

PART 402—INTERAGENCY COOPERATION—ENDANGERED SPECIES ACT OF 1973, AS AMENDED

10. The authority citation for part 402 continues to read as follows:

Authority: 16 U.S.C. 1531 *et seq.*

11. In § 402.14, paragraph (i)(1) is revised, the second sentence of paragraph (i)(3) is revised, and a new paragraph (i)(5) is added, to read as follows:

§ 402.14 Formal consultation.

• • • • • •

(i) • • •

(1) In those cases where the Service concludes that an action (or the implementation of any reasonable and prudent alternatives) and the resultant incidental take of listed species will not violate section 7(a)(2), and, in the case of marine mammals, where the taking is authorized pursuant to section 101(a)(5) of the Marine Mammal Protection Act of 1972, the Service will provide with the biological opinion a statement concerning incidental take that:

(i) Specifies the impact, i.e., the amount or extent, of such incidental taking on the species;

(ii) Specifies those reasonable and prudent measures that the Director considers necessary or appropriate to minimize such impact;

(iii) In the case of marine mammals, specifies those measures that are necessary to comply with section 101(a)(5) of the Marine Mammal Protection Act of 1972 and applicable regulations with regard to such taking;

(iv) Sets forth the terms and conditions (including, but not limited to, reporting requirements) that must be complied with by the Federal agency or any applicant to implement the measures specified under paragraph (i)(1)(ii) and (i)(1)(iii) of this section; and

(v) Specifies the procedures to be used to handle or dispose of any individuals of a species actually taken.

• • • • •

(3) • • • The reporting requirements will be established in accordance with 50 CFR 13.45 and 18.27 for FWS and 50 CFR 220.45 and 228.5 for NMFS.

• • • • •

(5) Any taking which is subject to a statement as specified in paragraph (i)(1) of this section and which is in compliance with the terms and conditions of that statement is not a prohibited taking under the Act, and no other authorization or permit under the Act is required.

• • • • •

Dated: July 10, 1989.

Susan Recce Lamson,

Assistant Secretary for Fish and Wildlife and Parks, Department of the Interior.

Dated: August 8, 1989.

James W. Brennan,

Assistant Administrator for Fisheries, National Oceanic and Atmospheric Administration.

[FR Doc. 89-23087 Filed 9-28-89; 8:45 am]

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APPENDIX B - FORMATS FOR CONSULTATIONS

[The following documents have been provided on disk. Instructions for use are provided in bold; section titles and standardized language are not in bold.]

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CHAPTER 1 - GENERAL INFORMATION

Form for Early Alert of pending jeopardy/adverse modification opinions B-2

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EARLY ALERT

Prepared for: Director State:
Date submitted:

ISSUE: Draft (jeopardy/adverse modification) (opinion/conference) for the (name of the project)

CONSULTING AGENCY/APPLICANT:

PROJECT DESCRIPTION: brief summary

EFFECT ON SPECIES/CRITICAL HABITAT: brief summary of effect on (species/critical habitat)

REASONABLE AND PRUDENT ALTERNATIVES: list

CONGRESSIONAL DISTRICTS AFFECTED:

EXPECTED REACTION OF AGENCY/APPLICANT/OTHER INTERESTED PARTIES:

REGIONAL OFFICE CONTACT:

Outline of a formal consultation package, including standardized statements

Address

Dear. . .

Introductory paragraph: The U.S. Fish and Wildlife Service (Service) has reviewed the (project plans, permit application, etc.) for the following activity (name or designation for the action) located in (County or State). Your (date) request for formal consultation was received on (date). This document represents the Service's biological opinion on the effects of that action on (species) in accordance with section 7 of the Endangered Species Act of 1973, as amended, (16 U.S.C. 1531 et seq.).

This biological opinion is based on information provided in the (date) biological assessment (or evaluation), the (date) draft environmental assessment (or environmental impact statement), the (date) project proposal, telephone conversations of (dates) with (names), field investigations, and other sources of information. A complete administrative record of this consultation is on file in (this office/elsewhere).

CONSULTATION HISTORY

BIOLOGICAL OPINION

DESCRIPTION OF PROPOSED ACTION

STATUS OF THE SPECIES (rangewide)

ENVIRONMENTAL BASELINE (in the action area)

Status of the Species

Effects of the Action

Cumulative Effects

Introduction: Cumulative effects include the effects of future State, local or private actions that are reasonably certain to occur in the action area considered in this biological opinion. Future Federal actions that are unrelated to the proposed action are not considered in this section because they require separate consultation pursuant to section 7 of ESA.

CONCLUSION

After reviewing the current status of (species), the environmental baseline for the action area [use if different from the range of the species], the effects of the proposed (action) and the cumulative effects, it is the Service's biological opinion that the (action), as proposed, (is/is not) likely to jeopardize the

continued existence of the (species), and (is/is not) likely to destroy or adversely modify designated critical habitat. [If no critical habitat has been designated for the species or the action will not affect designated critical habitat, use one of the following statements.] No critical habitat has been designated for this species, therefore, none will be affected. -OR- Critical habitat for this species has been designated at (location), however, this action does not affect that area and no destruction or adverse modification of that critical habitat is anticipated.

REASONABLE AND PRUDENT ALTERNATIVES (as appropriate)

Introductory paragraph: Regulations (50 CFR §402.02) implementing section 7 define reasonable and prudent alternatives as alternative actions, identified during formal consultation, that (1) can be implemented in a manner consistent with the intended purpose of the action, (2) can be implemented consistent with the scope of the action agency's legal authority and jurisdiction, (3) are economically and technologically feasible, and (4) would, the Service believes, avoid the likelihood of jeopardizing the continued existence of listed species or resulting in the destruction or adverse modification of critical habitat.

Closing paragraph: Because this biological opinion has found (jeopardy/destruction or adverse modification of critical habitat), the (agency) is required to notify the Service of its final decision on the implementation of the reasonable and prudent alternatives.

INCIDENTAL TAKE STATEMENT

Introductory paragraph: Sections 4(d) and 9 of ESA, as amended, prohibit taking (harass, harm, pursue, hunt, shoot, wound, kill, trap, capture or collect, or attempt to engage in any such conduct) of listed species of fish or wildlife without a special exemption. Harm is further defined to include significant habitat modification or degradation that results in death or injury to listed species by significantly impairing behavioral patterns such as breeding, feeding, or sheltering. Harass is defined as actions that create the likelihood of injury to listed species to such an extent as to significantly disrupt normal behavior patterns which include, but are not limited to, breeding, feeding or sheltering. Incidental take is any take of listed animal species that results from, but is not the purpose of, carrying out an otherwise lawful activity conducted by the Federal agency or the applicant. Under the terms of section 7(b)(4) and section 7(o)(2), taking that is incidental to and not intended as part of the agency action is not considered a prohibited taking provided that such taking is in compliance with the terms and conditions of this incidental take statement.

The measures described below are non-discretionary, and must be implemented by the agency so that they become binding conditions of any grant or permit issued to the applicant, as appropriate, in order for the exemption in section 7(o)(2) to apply. The (agency) has a continuing duty to regulate the activity covered by this incidental take statement. If the (agency) (1) fails to require the applicant to adhere to the terms and conditions of the incidental take statement through enforceable terms that are added to the permit or grant

document, and/or (2) fails to retain oversight to ensure compliance with these terms and conditions, the protective coverage of section 7(o)(2) may lapse.

If the biological opinion finds jeopardy or adverse modification without a reasonable and prudent alternative, the introductory statement is as follows: As the biological opinion finds that the proposed action will result in (likely jeopardy to the species/destruction or adverse modification of critical habitat), and no reasonable and prudent alternative can be identified, any incidental taking is prohibited by section 9 of ESA.

Special provisions for plants, as appropriate: Sections 7(b)(4) and 7(o)(2) of ESA do not apply to the incidental take of listed plant species. However, protection of listed plants is provided to the extent that ESA requires a Federal permit for removal or reduction to possession of endangered plants from areas under Federal jurisdiction, or for any act that would remove, cut, dig up, or damage or destroy any such species on any other area in knowing violation of any regulation of any State or in the course of any violation of a State criminal trespass law. [Include citations to appropriate State laws if helpful.]

AMOUNT OR EXTENT OF TAKE

Incidental take statement when no take is anticipated: The Service does not anticipate the proposed action will incidentally take any (species).

Incidental take statement where the biological opinion is jeopardy and incidental take still is anticipated. For opinions with only one reasonable and prudent alternative: The Service has developed the following incidental take statement based on the premise that the reasonable and prudent alternative will be implemented.

For opinions with more than one reasonable and prudent alternative, provide separate estimates of anticipated take, reasonable and prudent measures and terms and conditions, as appropriate: The Service has developed the following incidental take statement based on the premise that the reasonable and prudent alternative number XX will be implemented.

Introductory statement for amount and extent of take: The Service anticipates (number of individuals of (species)) could be taken as a result of this proposed action. Or the Service anticipates that individuals of (species) could be taken as a result of this proposed action due to (describe extent of relevant habitat degradation or disruption). The incidental take is expected to be in the form of (harm, harass, kill, etc.). [Separately specify take will be harm or harass or kill or some other form of take.]

[Provide a concise summary of the analysis leading to this determination.]

OR

The Service anticipates incidental take of (species) will be difficult to detect for the following reason(s): [Incidental take of actual species numbers may be difficult to detect when the species is wide-ranging; has small

body size; finding a dead or impaired specimen is unlikely; losses may be masked by seasonal fluctuations in numbers or other causes, (e.g., oxygen depletions for aquatic species); or the species occurs in habitat (e.g., caves) that makes detection difficult]. However, the following level of take of this species can be anticipated by loss [quantify] of (surrogate species, food, cover, other essential habitat element such as water quantity or quality, or symbiont) because: [provide an explanation].

Bald eagles: If incidental take of bald eagles is anticipated, document that take, but add the following statement. [Note: This statement ends discussion of bald eagles in the incidental take statement.] The incidental take of bald eagles is not authorized by the Bald and Golden Eagle Protection Act. Therefore such take will not be authorized under this incidental take statement.

EFFECT OF THE TAKE

The opinion is no jeopardy/no adverse modification: In the accompanying biological opinion, the Service determined that this level of anticipated take is not likely to result in jeopardy to the species or destruction or adverse modification of critical habitat.

When the opinion contains reasonable and prudent alternatives: In the accompanying biological opinion, the Service determined that this level of anticipated take is not likely to result in jeopardy to the species or destruction or adverse modification of critical habitat when (one of) the reasonable and prudent alternative(s) is implemented.

REASONABLE AND PRUDENT MEASURES (as appropriate)

Introductory paragraph for reasonable and prudent measures for species other than marine mammals: The Service believes the following reasonable and prudent measure(s) are necessary and appropriate to minimize take: [Go on to list these measures.]

For section 10(a)(1)(B) permits - HCPs - add the verbiage in parentheses for cases where an implementing agreement is required to ensure that the terms of the habitat conservation plan are carried out. Appropriate changes may be made in the wording of the following paragraphs when consulting on any subsequent amendments to the permit: Any incidental take of (species) must comply with all the terms and conditions of the section 10(a)(1)(B) permit (including the provisions of the Implementing Agreement).

Note: The Marine Mammal Protection Act Amendments of 1994 authorize incidental take of marine mammals in the form of "harassment" for non-commercial fishing activities, and permits for death/injury incidental take for commercial fishing activities (without the issuance of activity-specific regulations), under certain circumstances. Regulations implementing these amendments are anticipated early in 1995. Further guidance on standardized statements for these activities will be provided at that time.) (Standard paragraph for incidental take of marine mammals after area-specific or activity-specific

regulations have taken effect: Pursuant to section 101(a)(5) of the Marine Mammal Protection Act, as amended in 1994, and implementing regulations at 50 CFR §18.27, the following measures are required to be consistent with the total taking allowable under the area/activity specific regulations at 50 CFR §18.27(_) [insert appropriate citation] and to effect the least practical adverse impact on the species and its habitat and on the availability of the species for subsistence uses: [Cite measures identified in specific regulations and/or letters of authorization or permits for commercial fishing.] Pursuant to section 7(b)(4) of the Endangered Species Act, the following reasonable and prudent measures are necessary and appropriate to minimize take:

[Go on to list the measures, followed by the standard paragraph for terms and conditions.]

TERMS AND CONDITIONS

Introductory paragraph for terms and conditions: In order to be exempt from the prohibitions of section 9 of ESA, the (agency) must comply with the following terms and conditions, which implement the reasonable and prudent measures described above. These terms and conditions are nondiscretionary.

[Go on to list these terms and conditions, including the requirements for monitoring, reporting, review, and disposition of any specimens.]

For section 10(a)(1)(B) permits - HCPs - add the verbiage in parentheses for cases where an implementing agreement is required to ensure that the terms of the habitat conservation plan are carried out. Appropriate changes may be made in the wording of the following paragraphs when consulting on any subsequent amendments to the permit: A section 10(a)(1)(B) permit, as evaluated in this biological opinion, must be issued by the Fish and Wildlife Service. (The Implementing Agreement for the Habitat Conservation Plan for the section 10(a)(1)(B) permit must be agreed to by the Fish and Wildlife Service.)

Disposition paragraph for pesticide situations The U.S. Fish and Wildlife Service (in the Region of the species' occurrence) must be notified by (action agency) immediately of any dead or sick individuals found in or adjacent to pesticide-treated areas. Cause of death or illness, if known, also should be conveyed to these offices. [List appropriate Regional contact.]

The Service has provided a protocol for the handling of dead, injured or ill listed species for pesticide analysis. When the (agency) suspects a species has been taken in violation of label restrictions, the incident(s) shall be reported to the U.S. Fish and Wildlife Service, Division of Law Enforcement or their designee in the Region in which the species is found. Instructions for proper handling and disposition of such specimens will be issued by the Division of Law Enforcement. [Include Law Enforcement contacts for appropriate Region(s).]

[The referenced protocol for pesticide situations can be found in Appendix F.]

Monitoring for pesticides (EPA or FDA): The agency shall monitor incidental take to ensure compliance with anticipated take levels as required by 50 CFR §402.14(i)(3). The Service believes that a label or bulletin requirement for users to immediately report any dead or sick listed species found in or adjacent to pesticide use areas would assist the (Environmental Protection Agency/Food and Drug Administration) in meeting this requirement. Such a requirement provides an incentive to the user to report such incidents to remain exempt from section 9 taking provisions. However, the Service also believes the agency should strengthen its information gathering base by obtaining assistance from State or Federal wildlife or plant agencies, the Extension Service, Department of Agriculture cooperatives or educational or private organizations in reporting possible listed species take from pesticides.

Review requirement: The reasonable and prudent measures, with their implementing terms and conditions, are designed to minimize incidental take that might otherwise result from the proposed action. With implementation of these measures the Service believes that no more than (number or extent) will be incidentally taken. If, during the course of the action, this minimized level of incidental take is exceeded, such incidental take would represent new information requiring review of the reasonable and prudent measures provided. The Federal agency must immediately provide an explanation of the causes of the taking and review with the Service the need for possible modification of the reasonable and prudent measures.

Closing statement for listed migratory birds: Notice: While the incidental take statement provided in this consultation satisfies the requirements of the Endangered Species Act, as amended, it does not constitute an exemption from the prohibitions of take of listed migratory birds under the more restrictive provisions of the Migratory Bird Treaty Act.

Closing statement for listed migratory birds: Notice: While the incidental take statement provided in this consultation satisfies the requirements of the Endangered Species Act, as amended, it does not constitute an exemption from the prohibitions of take of listed migratory birds under the more restrictive provisions of the Migratory Bird Treaty Act.

Closing paragraph for marine mammals - Note: The Marine Mammal Protection Act Amendments of 1994 authorize incidental take of marine mammals in the form of "harassment" for non-commercial fishing activities (without the issuance of activity-specific regulations), and permits for death/injury incidental take for commercial fishing activities under certain circumstances. Regulations implementing these amendments are anticipated early in 1995. Further guidance on standardized statements for these activities will be provided at that time.) (Before area- or activity-specific regulations are promulgated: The Service is not including an incidental take authorization for marine mammals at this time because the regulations required for incidental take of marine mammals in this specific area or for this activity have not been issued under section 101(a)(5) of the Marine Mammal Protection Act and/or its 1994 Amendments. Following issuance of such regulations, the Service may amend this biological opinion to include an incidental take statement for marine mammals, as appropriate.

CONFERENCE REPORT/CONFERENCE NOTICE (as appropriate)

CONSERVATION RECOMMENDATIONS

Introductory paragraph: Section 7(a)(1) of ESA directs Federal agencies to utilize their authorities to further the purposes of ESA by carrying out conservation programs for the benefit of endangered and threatened species. Conservation recommendations are discretionary agency activities to minimize or avoid adverse effects of a proposed action on listed species or critical habitat, to help implement recovery plans, or to develop information.

Closing paragraph: In order for the Service to be kept informed of actions minimizing or avoiding adverse effects or benefitting listed species or their habitats, the Service requests notification of the implementation of any conservation recommendations.

REINITIATION - CLOSING STATEMENT

This concludes formal consultation on the action(s) outlined in the (request/reinitiation request). As provided in 50 CFR §402.16, reinitiation of formal consultation is required where discretionary Federal agency involvement or control over the action has been maintained (or is authorized by law) and if: (1) the amount or extent of incidental take is exceeded; (2) new information reveals effects of the agency action that may affect listed species or critical habitat in a manner or to an extent not considered in this opinion; (3) the agency action is subsequently modified in a manner that causes an effect to the listed species or critical habitat that was not considered in this opinion; or (4) a new species is listed or critical habitat designated that may be affected by the action. In instances where the amount or extent of incidental take is exceeded, any operations causing such take must cease pending reinitiation.

LITERATURE CITED

Example of a letter sent to inform action agencies the Service has received a complete initiation package and will begin formal consultation on a proposed action.

Dear :

This letter acknowledges the U.S. Fish and Wildlife Service's (Service) (date of receipt of letter initiating consultation) receipt of your (date of agency's initiating letter) letter requesting initiation of formal section 7 consultation under the Endangered Species Act. The consultation concerns the possible effects of your proposed [name and location of the action] on (name of listed species and/or critical habitats affected).

All information required of you to initiate consultation was either included with your letter or is otherwise accessible for our consideration and reference. We have assigned log number (log number) to this consultation. Please refer to that number in future correspondence on this consultation.

Section 7 allows the Service up to 90 days to conclude formal consultation with your agency and an additional 45 days to prepare our biological opinion (unless we mutually agree to an extension). Therefore, we expect to provide you with our biological opinion before (date 135 days after receipt of initiation request).

As a reminder, the Endangered Species Act requires that after initiation of formal consultation, the Federal action agency make no irreversible or irretrievable commitment of resources that limits future options. This practice insures agency actions do not preclude the formulation or implementation of reasonable and prudent alternatives that avoid jeopardizing the continued existence of endangered or threatened species or destroying or modifying their critical habitats.

If you have any questions or concerns about this consultation or the consultation process in general, please feel free to contact me or (name of staff member] at [number).

Sincerely,

Field Supervisor

Example of a letter sent when a complete formal consultation request has not been received.

Dear :

The Fish and Wildlife Service has not received all of the information necessary to initiate formal consultation on (name of the project) as outlined in the regulations governing interagency consultations (50 CFR §402.14). To complete the initiation package, we will require the following information:

1. **[Outline the additional information needs. Follow the general sequence and use language that parallels 50 CFR §402.14(c) to identify each piece of information.]**

2. **[etc.]**

Until we receive all of the information, or a statement explaining why that information cannot be made available, the formal consultation process for the project does not begin. We will notify your office when we receive this additional information; our notification letter will also outline the dates within which formal consultation should be complete and the biological opinion delivered on the proposed action.

If you have any questions or concerns about this consultation or the consultation process in general, please feel free to call me at (number).

Sincerely,

Field Supervisor

Outline of a formal, stand-alone conference package, including standardized statements

Address

Dear. . .

Introductory paragraph: The U.S. Fish and Wildlife Service (Service) has reviewed the (project plans, permit application, etc.) for the following activity (name or designation for the action) located in (County or State). Your (date) request for formal conference was received on (date). This document represents the Service's conference opinion on the effects of that action on (species) in accordance with section 7 of the Endangered Species Act of 1973, as amended, (16 U.S.C. 1531 et seq.).

This conference opinion is based on information provided in the (date) biological assessment (or evaluation), the (date) draft environmental assessment (or environmental impact statement), the (date) project proposal, telephone conversations of (dates) with (names), field investigations, and other sources of information. A complete administrative record of this consultation is on file in (this office/elsewhere).

CONFERENCE HISTORY

CONFERENCE OPINION

DESCRIPTION OF PROPOSED ACTION

STATUS OF THE SPECIES (range wide)

ENVIRONMENTAL BASELINE (in the action area)

Status of the Species

Effects of the Action

Cumulative Effects

Introduction: Cumulative effects include the effects of future State, local or private actions that are reasonably certain to occur in the action area considered in this conference opinion. Future Federal actions that are unrelated to the proposed action are not considered in this section because they require separate consultation pursuant to section 7 of ESA.

CONCLUSION

If no jeopardy/adverse modification: After reviewing the current status of (species), the environmental baseline for the action area [use if different from the range of the species], the effects of the proposed (action) and the cumulative effects, it is the Service's conference opinion that the (action),

as proposed, (is not likely to jeopardize the continued existence of the proposed (species), and/or is not likely to destroy or adversely modify proposed critical habitat).

In jeopardy or adverse modification opinions: Based on the foregoing analysis, the Service concurs with the agency that the (proposed action) is likely to (jeopardize the continued existence of the proposed species and/or destroy or adversely modify the proposed critical habitat). While ESA does not preclude an agency from taking an action with such adverse effects on a proposed (species/critical habitat), the (agency) is reminded that if the (species is listed/critical habitat is designated) prior to the completion of the action or while (agency) still maintains any discretionary authority relative to the action the (agency) will be required to insure against such adverse effects. The (agency) may be required to modify or suspend the action at that time pending resolution of the requirement to formally consult under section 7. Consequently, the Service advises the (agency) to consider implementing the following reasonable and prudent alternative(s).

REASONABLE AND PRUDENT ALTERNATIVES (as appropriate)

Introductory paragraph: Regulations (50 CFR §402.02) implementing section 7 define reasonable and prudent alternatives as alternative actions, identified during formal consultation, that (1) can be implemented in a manner consistent with the intended purpose of the action, (2) can be implemented consistent with the scope of the action agency's legal authority and jurisdiction, (3) are economically and technologically feasible, and (4) would, the Service believes, avoid the likelihood of (jeopardizing the continued existence of proposed species and/or resulting in the destruction or adverse modification of proposed critical habitat).

INCIDENTAL TAKE STATEMENT

Introductory paragraph: Sections 4(d) and 9 of ESA, as amended, prohibit taking (harass, harm, pursue, hunt, shoot, wound, kill, trap, capture or collect, or attempt to engage in any such conduct) of listed species of fish or wildlife without a special exemption. Harm is further defined to include significant habitat modification or degradation that results in death or injury to listed species by significantly impairing behavioral patterns such as breeding, feeding, or sheltering. Harass is defined as actions that create the likelihood of injury to listed species to such an extent as to significantly disrupt normal behavior patterns which include, but are not limited to, breeding, feeding or sheltering. Incidental take is any take of listed animal species that results from, but is not the purpose of, carrying out an otherwise lawful activity conducted by the Federal agency or the applicant. Under the terms of section 7(b)(4) and section 7(o)(2), taking that is incidental to and not intended as part of the agency action is not considered a prohibited taking provided that such taking is in compliance with the terms and conditions of this incidental take statement.

The measures described below are non-discretionary, and must be implemented by

the agency, if this conference opinion is adopted as the biological opinion issued through formal consultation, so that they become binding conditions of any grant or permit issued to the applicant, as appropriate, in order for the exemption in section 7(o)(2) to apply. The (agency) has a continuing duty to regulate the activity covered by this incidental take statement. If the (agency) (1) fails to require the applicant to adhere to the terms and conditions of the incidental take statement through enforceable terms that are added to the permit or grant document, and/or (2) fails to retain oversight to ensure compliance with these terms and conditions, the protective coverage of section 7(o)(2) may lapse.

If the conference opinion finds jeopardy or adverse modification without a reasonable and prudent alternative, the introductory statement is as follows: As the conference opinion finds that the proposed action will result in (likely jeopardy to the species/destruction or adverse modification of critical habitat), and no reasonable and prudent alternative can be identified, any incidental taking is prohibited by section 9 of ESA.

Special provisions for plants, as appropriate: Sections 7(b)(4) and 7(o)(2) of ESA do not apply to the incidental take of listed plant species. However, protection of listed plants is provided to the extent that ESA requires a Federal permit for removal or reduction to possession of endangered plants from areas under Federal jurisdiction, or for any act that would remove, cut, dig up, or damage or destroy any such species on any other area in knowing violation of any regulation of any State or in the course of any violation of a State criminal trespass law. **[Include citations to appropriate State laws if helpful.]**

AMOUNT OR EXTENT OF TAKE

Incidental take statement when no take is anticipated: The Service does not anticipate the proposed action will incidentally take any (species).

Incidental take statement where the conference opinion is jeopardy and incidental take still is anticipated. For opinions with only one reasonable and prudent alternative: The Service has developed the following incidental take statement based on the premise that the reasonable and prudent alternative will be implemented.

For opinions with more than one reasonable and prudent alternative, provide separate estimates of anticipated take, reasonable and prudent measures and terms and conditions, as appropriate: The Service has developed the following incidental take statement based on the premise that the reasonable and prudent alternative number XX will be implemented.

Introductory statement for amount and extent of take: The Service anticipates (number of individuals of (species)) could be taken as a result of this proposed action. Or the Service anticipates that individuals of (species) could be taken as a result of this proposed action due to (describe extent of relevant habitat degradation or disruption). The incidental take is expected to be in the form of (harm, harass, kill, etc.). **[Separately specify take will be harm or harass or kill or some other form of take.]**

[Provide a concise summary of the analysis leading to this determination.]

OR

The Service anticipates incidental take of (species) will be difficult to detect for the following reason(s): [Incidental take of actual species numbers may be difficult to detect when the species is wide-ranging; has small body size; finding a dead or impaired specimen is unlikely; losses may be masked by seasonal fluctuations in numbers or other causes, (e.g., oxygen depletions for aquatic species); or the species occurs in habitat (e.g., caves) that makes detection difficult]. However, the following level of take of this species can be anticipated by loss [quantify] of (surrogate species, food, cover, other essential habitat element such as water quantity or quality, or symbiont) because: [provide an explanation].

Bald eagles: If incidental take of bald eagles is anticipated, document that take, but add the following statement. [Note: This statement ends discussion of bald eagles in the incidental take statement.] The incidental take of bald eagles is not authorized by the Bald and Golden Eagle Protection Act. Therefore such take will not be authorized by this incidental take statement.

EFFECT OF THE TAKE

The opinion is no jeopardy/no adverse modification: In the accompanying conference opinion, the Service determined that this level of anticipated take is not likely to result in jeopardy to the species or destruction or adverse modification of critical habitat.

When the opinion contains reasonable and prudent alternatives: In the accompanying conference opinion, the Service determined that this level of anticipated take is not likely to result in jeopardy to the species or destruction or adverse modification of critical habitat when (one of) the reasonable and prudent alternative(s) is implemented.

REASONABLE AND PRUDENT MEASURES (as appropriate)

Introductory paragraph for reasonable and prudent measures for species other than marine mammals: The Service believes the following reasonable and prudent measure(s) are necessary and appropriate to minimize take: [Go on to list these measures.]

TERMS AND CONDITIONS

Introductory paragraph for terms and conditions: In order to be exempt from the prohibitions of section 9 of ESA, the (agency) must comply with the following terms and conditions, which implement the reasonable and prudent measures described above. These terms and conditions are nondiscretionary.

[Go on to list these terms and conditions, including the requirements for

monitoring, reporting, review, and disposition of any specimens.]

Disposition paragraph for pesticide situations The U.S. Fish and Wildlife Service (in the Region of the species' occurrence) must be notified by (action agency) immediately of any dead or sick individuals found in or adjacent to pesticide-treated areas. Cause of death or illness, if known, also should be conveyed to these offices. [List appropriate Regional contact.]

The Service has provided a protocol for the handling of dead, injured or ill listed species for pesticide analysis. When the (agency) suspects a species has been taken in violation of label restrictions, the incident(s) shall be reported to the U.S. Fish and Wildlife Service, Division of Law Enforcement or their designee in the Region in which the species is found. Instructions for proper handling and disposition of such specimens will be issued by the Division of Law Enforcement. [Include Law Enforcement contacts for appropriate Region(s).]

[The referenced protocol for pesticide situations can be found in Appendix F.]

Monitoring for pesticides (EPA or FDA): The agency shall monitor incidental take to ensure compliance with anticipated take levels as required by 50 CFR §402.14(i)(3). The Service believes that a label or bulletin requirement for users to immediately report any dead or sick listed species found in or adjacent to pesticide use areas would assist the (Environmental Protection Agency/Food and Drug Administration) in meeting this requirement. Such a requirement provides an incentive to the user to report such incidents to remain exempt from section 9 taking provisions. However, the Service also believes the agency should strengthen its information gathering base by obtaining assistance from State or Federal wildlife or plant agencies, the Extension Service, Department of Agriculture cooperatives or educational or private organizations in reporting possible listed species take from pesticides.

Review requirement: The reasonable and prudent measures, with their implementing terms and conditions, are designed to minimize incidental take that might otherwise result from the proposed action. With implementation of these measures the Service believes that no more than (number or extent) will be incidentally taken. If, during the course of the action, this minimized level of incidental take is exceeded, such incidental take would represent new information requiring review of the reasonable and prudent measures provided. The Federal agency must immediately provide an explanation of the causes of the taking and review with the Service the need for possible modification of the reasonable and prudent measures.

Closing statement for listed migratory birds: Notice: While the incidental take statement provided in this consultation satisfies the requirements of the Endangered Species Act, as amended, it does not constitute an exemption from the prohibitions of take of listed migratory birds under the more restrictive provisions of the Migratory Bird Treaty Act.

CONSERVATION RECOMMENDATIONS

Introductory paragraph: Section 7(a)(1) of ESA directs Federal agencies to utilize their authorities to further the purposes of ESA by carrying out conservation programs for the benefit of endangered and threatened species. Conservation recommendations are discretionary agency activities to minimize or avoid adverse effects of a proposed action on listed species or critical habitat, to help implement recovery plans, or to develop information.

Closing paragraph; In order for the Service to be kept informed of actions minimizing or avoiding adverse effects or benefitting listed species or their habitats, the Service requests notification of the implementation of any conservation recommendations.

REINITIATION - CLOSING STATEMENT

Closing statement for formal conferences: This concludes the conference for (action). You may ask the Service to confirm the conference opinion as a biological opinion issued through formal consultation if the (species is listed or critical habitat is designated). The request must be in writing. If the Service reviews the proposed action and finds that there have been no significant changes in the action as planned or in the information used during the conference, the Service will confirm the conference opinion as the biological opinion on the project and no further section 7 consultation will be necessary.

After (listing of the (species) as endangered/threatened and/or designation of critical habitat for (species)) and any subsequent adoption of this conference opinion, the Federal agency shall request reinitiation of consultation if: (1) the amount or extent of incidental take is exceeded; (2) new information reveals effects of the agency action that may affect the species or critical habitat in a manner or to an extent not considered in this conference opinion; (3) the agency action is subsequently modified in a manner that causes an effect to the species or critical habitat that was not considered in this conference opinion; or (4) a new species is listed or critical habitat designated that may be affected by the action.

The incidental take statement provided in this conference opinion does not become effective until the species is listed and the conference opinion is adopted as the biological opinion issued through formal consultation. At that time, the project will be reviewed to determine whether any take of the (species) has occurred. Modifications of the opinion and incidental take statement may be appropriate to reflect that take. No take of the (species) may occur between the (listing of the (species)) and the adoption of the conference opinion through formal consultation, or the completion of a subsequent formal consultation.

LITERATURE CITED

Outline of a formal conference incorporated into a formal consultation package, including standardized statements

Address

Dear. . .

Introductory paragraph: The U.S. Fish and Wildlife Service (Service) has reviewed the (project plans, permit application, etc.) for the following activity (name or designation for the action) located in (County or State). Your (date) request was received on (date). This document represents the Service's biological and conference opinions on the effects of that action on the following listed and proposed species (species names) in accordance with section 7 of the Endangered Species Act of 1973, as amended, (16 U.S.C. 1531 et seq.).

These biological and conference opinions are based on information provided in the (date) (biological assessment or evaluation), the (date) draft (environmental assessment or environmental impact statement), the (date) project proposal, telephone conversations of (dates) with (names), field investigations, and other sources of information. A complete administrative record of this consultation is on file in (this office/elsewhere).

CONSULTATION HISTORY

BIOLOGICAL AND CONFERENCE OPINIONS

DESCRIPTION OF PROPOSED ACTION

STATUS OF THE SPECIES (range wide and/or recovery unit)

Listed species/critical habitat:

Proposed species/critical habitat:

ENVIRONMENTAL BASELINE (in the action area)

Status of the Species

Listed species/critical nabitat:

Proposed species/critical habitat:

EFFECTS OF THE ACTION

Listed species/critical habitat:

Proposed species/critical habitat:

CUMULATIVE EFFECTS

Cumulative effects include the effects of future State, local or private actions that are reasonably certain to occur in the action area considered in this biological opinion. Future Federal actions that are unrelated to the proposed action are not considered in this section because they require separate consultation pursuant to section 7 of ESA.

CONCLUSION

Listed species/critical habitat:

After reviewing the current status of (species), the environmental baseline for the action area [use if different from the range of the species], the effects of the proposed (action) and the cumulative effects, it is the Service's biological opinion that the (action), as proposed, (is/is not) likely to jeopardize the continued existence of the (species), and (is/is not) likely to destroy or adversely modify designated critical habitat. [If no critical habitat has been designated for the species or the action will not affect designated critical habitat, use one of the following statements.] No critical habitat has been designated for this species, therefore, none will be affected. -OR- Critical habitat for this species has been designated at (location), however, this action does not affect that area and no destruction or adverse modification of that critical habitat is anticipated.

Proposed species/proposed critical habitat:

If no jeopardy/no adverse modification: After reviewing the current status of (species), the environmental baseline for the action area [use if different from the range of the species], the effects of the proposed (action) and the cumulative effects, it is the Service's conference opinion that the (action), as proposed, (is not likely to jeopardize the continued existence of the proposed (species), and/or is not likely to destroy or adversely modify proposed critical habitat).

In jeopardy or adverse modification opinions: Based on the foregoing analysis the Service concurs with the agency that the (proposed action) is likely to (jeopardize the continued existence of the proposed species and/or destroy or adversely modify the proposed critical habitat). While ESA does not preclude an agency from taking an action with such adverse effects on a proposed (species/critical habitat), the (agency) is reminded that if the (species is listed/critical habitat is designated) prior to the completion of the action or while (agency) still maintains any discretionary authority relative to the action (agency) will be required to insure against such adverse effects. The (agency) may be required to modify or suspend the action at that time pending resolution of the requirement to formally consult under section 7. Consequently, the Service advises the (agency) to consider implementing the following reasonable and prudent alternative(s).

REASONABLE AND PRUDENT ALTERNATIVES (as appropriate)

Introductory paragraph: Regulations (50 CFR §402.02) implementing section 7 define reasonable and prudent alternatives as alternative actions, identified during formal consultation, that (1) can be implemented in a manner consistent with the intended purpose of the action, (2) can be implemented consistent with the scope of the action agency's legal authority and jurisdiction, (3) are economically and technologically feasible, and (4) would, the Service believes, avoid the likelihood of jeopardizing the continued existence of listed and proposed species or resulting in the destruction or adverse modification of designated or proposed critical habitat.

[Break out discussions for listed and proposed species/critical habitats separately.]

Closing paragraph: Because this (biological and/or conference) opinion has found (jeopardy/destruction or adverse modification of critical habitat), the (agency) is required to notify the Service of its final decision on the implementation of the reasonable and prudent alternatives.

INCIDENTAL TAKE STATEMENT

Introductory paragraph: Sections 4(d) and 9 of ESA, as amended, prohibit taking (harass, harm, pursue, hunt, shoot, wound, kill, trap, capture or collect, or attempt to engage in any such conduct) of listed species of fish or wildlife without a special exemption. Harm is further defined to include significant habitat modification or degradation that results in death or injury to listed species by significantly impairing behavioral patterns such as breeding, feeding, or sheltering. Harass is defined as actions that create the likelihood of injury to listed species to such an extent as to significantly disrupt normal behavior patterns which include, but are not limited to, breeding, feeding or sheltering. Incidental take is any take of listed animal species that results from, but is not the purpose of, carrying out an otherwise lawful activity conducted by the Federal agency or the applicant. Under the terms of section 7(b)(4) and section 7(o)(2), taking that is incidental to and not intended as part of the agency action is not considered a prohibited taking provided that such taking is in compliance with the terms and conditions of this incidental take statement.

The measures described below are nondiscretionary, and must be implemented by the agency so that they become binding conditions of any grant or permit issued to the applicant, as appropriate, in order for the exemption in section 7(o)(2) to apply. The (agency) has a continuing duty to regulate the activity covered by this incidental take statement. If the (agency) (1) fails to require the applicant to adhere to the terms and conditions of the incidental take statement through enforceable terms that are added to the permit or grant document, and/or (2) fails to retain oversight to ensure compliance with these terms and conditions, the protective coverage of section 7(o)(2) may lapse.

If the biological and/or conference opinion finds jeopardy or adverse modification without a reasonable and prudent alternative, the introductory

statement is as follows: As the (biological and/or conference) opinion finds that the proposed action will result in (likely jeopardy to the species/destruction or adverse modification of critical habitat), and no reasonable and prudent alternative can be identified, any incidental taking is prohibited by section 9 of ESA.

Special provisions for plants, as appropriate: Sections 7(b)(4) and 7(o)(2) of ESA do not apply to the incidental take of listed plant species. However, protection of listed plants is provided to the extent that ESA requires a Federal permit for removal or reduction to possession of endangered plants from areas under Federal jurisdiction, or for any act that would remove, cut, dig up, or damage or destroy any such species on any other area in knowing violation of any regulation of any State or in the course of any violation of a State criminal trespass law. [Include citations to appropriate State laws if helpful.]

AMOUNT OR EXTENT OF TAKE

[Break out discussions for listed and proposed species separately.]

Incidental take statement when no take is anticipated: The Service does not anticipate that the proposed action will incidentally take any (species).

Incidental take statement where the biological and/or conference opinion is jeopardy and incidental take still is anticipated: (For opinions with only one reasonable and prudent alternative): The Service has developed the following incidental take statement based on the premise that the reasonable and prudent alternative will be implemented.

(For opinions with more than one reasonable and prudent alternative, provide separate estimates of anticipated take, reasonable and prudent measures and terms and conditions, as appropriate): The Service has developed the following incidental take statement based on the premise that the reasonable and prudent alternative number XX will be implemented.

Introductory statement for amount and extent of take: The Service anticipates (number of individuals of (species)) could be taken as a result of this proposed action. Or the Service anticipates that individuals of (species) could be taken as a result of this proposed action due to (describe extent of relevant habitat degradation or disruption). The incidental take is expected to be in the form of (harm, harass, kill, etc.). [Separately specify take will be harm or harass or kill or some other form of take.]

[Provide a concise summary of the analysis leading to this determination.]

OR

The Service anticipates incidental take of (species) will be difficult to detect for the following reason(s): [Incidental take of actual species numbers may be difficult to detect when the species is wide-ranging; has small body size; finding a dead or impaired specimen is unlikely; losses may be masked by

seasonal fluctuations in numbers or other causes, (e.g., oxygen depletions for aquatic species); or the species occurs in habitat (e.g., caves) that makes detection difficult]. However, the following level of take of this species can be anticipated by loss [quantify] of (surrogate species, food, cover, other essential habitat element such as water quantity or quality, or symbiont) because: [provide an explanation].

Bald eagles: If incidental take of bald eagles is anticipated, document that take, but add the following statement. [Note: This statement ends discussion of bald eagles in the incidental take statement.] The incidental take of bald eagles is not authorized by the Bald and Golden Eagle Protection Act. Therefore such take will not be authorized by this incidental take statement.

EFFECT OF THE TAKE

[Break out discussions for listed and proposed species separately.]

When the opinion is no jeopardy/no adverse modification: In the accompanying (biological and/or conference) opinion, the Service determined that this level of anticipated take is not likely to result in jeopardy to the species or destruction or adverse modification of critical habitat.

When the opinion contains reasonable and prudent alternatives: In the accompanying (biological and/or conference) opinion, the Service determined that this level of anticipated take is not likely to result in jeopardy to the species or destruction or adverse modification of critical habitat when (one of) the reasonable and prudent alternative(s) is implemented.

REASONABLE AND PRUDENT MEASURES (as appropriate)

[Break out discussions for listed and proposed species separately.]

Introductory paragraph for reasonable and prudent measures for species other than marine mammals: The Service believes the following reasonable and prudent measure(s) are necessary and appropriate to minimize take: [Go on to list these measures.]

Proposed species, add: The prohibitions against taking the species found in section 9 of ESA do not apply until the species is listed. However, the Service advises the (agency) to consider implementing the following reasonable and prudent measures. If this conference opinion is adopted as a biological opinion following a listing or designation, these measures, with their implementing terms and conditions, will be nondiscretionary.

Section 10(a)(1)(B) permits - HCPs - Add the verbiage in parentheses for cases where an implementing agreement is required to ensure that the terms of the habitat conservation plan are carried out. Appropriate changes may be made in the wording of the following paragraphs when consulting on any subsequent amendments to the permit. Any incidental take of (species) must comply with all the terms and conditions of the section 10(a)(1)(B) permit (including the provisions of the Implementing Agreement).

Standard paragraph for incidental take of marine mammals: [Note: The Marine Mammal Protection Act Amendments of 1994 authorize incidental take of marine mammals in the form of "harassment" for non-commercial fishing activities, (without the issuance of activity-specific regulations), and permits for death/injury incidental take for commercial fishing activities under certain circumstances. Regulations implementing these amendments are anticipated early in 1995. Further guidance on standardized statements for these activities will be provided at that time.] After area-specific or activity-specific regulations have taken effect: Pursuant to section 101(a)(5) of the Marine Mammal Protection Act, as amended in 1994, and implementing regulations at 50 CFR §18.27, the following measures are required to be consistent with the total taking allowable under the area/activity specific regulations at 50 CFR §18.27(_) [insert appropriate citation] and to effect the least practical adverse impact on the species and its habitat and on the availability of the species for subsistence uses: [Cite measures identified in specific regulations and/or letters of authorization or permits for commercial fishing]. Pursuant to section 7(b)(4) of the Endangered Species Act, the following reasonable and prudent measures are necessary and appropriate to minimize take:

[Go on to list the measures, followed by the standard paragraph for terms and conditions.]

TERMS AND CONDITIONS

[Break out discussions for listed and proposed species separately.]

Introductory paragraph for terms and conditions: In order to be exempt from the prohibitions of section 9 of ESA, the (agency) must comply with the following terms and conditions, which implement the reasonable and prudent measures described above. These terms and conditions are nondiscretionary.

[Go on to list these terms and conditions, including requirements for monitoring, reporting, review, and disposition of any specimens.]

Section 10(a)(1)(B) permits - HCPs - Add the verbiage in parentheses for cases where an implementing agreement is required to ensure that the terms of the habitat conservation plan are carried out. Appropriate changes may be made in the wording of the following paragraphs when consulting on any subsequent amendments to the permit. A section 10(a)(1)(B) permit, as evaluated in this conference opinion, must be agreed to by the Fish and Wildlife Service. (The Implementing Agreement for the Habitat Conservation Plan for the section 10(a)(1)(B) permit must be agreed to by the Fish and Wildlife Service.)

Disposition paragraph for pesticide situations: The U.S. Fish and Wildlife Service (in the Region of the species' occurrence) must be notified by (action agency) immediately of any dead or sick individuals found in or adjacent to pesticide-treated areas. Cause of death or illness, if known, also should be conveyed to these offices. [List appropriate Regional contact].

The Service has provided a protocol for the handling of dead, injured or ill listed species for pesticide analysis. When the (agency) suspects a species has been taken in violation of label restrictions, the incident(s) shall be reported to the U.S. Fish and Wildlife Service, Division of Law Enforcement or their designee in the Region in which the species is found. Instructions for proper handling and disposition of such specimens will be issued by the Division of Law Enforcement. [Include Law Enforcement contacts for appropriate Region(s).]

[The referenced protocol for pesticide situations can be found in Appendix F.]

Monitoring for pesticides (EPA or FDA): The agency shall monitor incidental take to ensure compliance with anticipated take levels as required by 50 CFR §402.14(i)(3). The Service believes that a label or bulletin requirement for users to immediately report any dead or sick listed species found in or adjacent to pesticide use areas would assist the (Environmental Protection Agency/Food and Drug Administration) in meeting this requirement. Such a requirement provides an incentive to the user to report such incidents to remain exempt from section 9 taking provisions. However, the Service also believes the agency should strengthen its information gathering base by obtaining assistance from State or Federal wildlife or plant agencies, the Extension Service, Department of Agriculture cooperatives or educational or private organizations in reporting possible listed species take from pesticides.

Review requirement: The reasonable and prudent measures, with their implementing terms and conditions, are designed to minimize incidental take that might otherwise result from the proposed action. With implementation of these measures the Service believes that no more than (number or extent) will be incidentally taken. If, during the course of the action, this minimized level of incidental take is exceeded, such incidental take would represent new information requiring review of the reasonable and prudent measures provided. The Federal agency must immediately provide an explanation of the causes of the taking and review with the Service the need for possible modification of the reasonable and prudent measures.

Closing statement (for migratory birds and marine mammals)

Closing statement for listed migratory birds: Notice: While the incidental take statement provided in this consultation satisfies the requirements of the Endangered Species Act, as amended, it does not constitute an exemption from the prohibitions of take of listed migratory birds under the more restrictive provisions of the Migratory Bird Treaty Act.

Standard paragraph for incidental take of marine mammals: [Note: The Marine Mammal Protection Act Amendments of 1994 authorize incidental take of marine mammals in the form of "harassment" for non-commercial fishing activities, (without the issuance of activity-specific regulations), and permits for death/injury incidental take for commercial fishing activities under certain

circumstances. Regulations implementing these amendments are anticipated early in 1995. Further guidance on standardized statements for these activities will be provided at that time.] Before area- or activity-specific regulations are promulgated: The Service is not including an incidental take authorization for marine mammals at this time because the regulations required for incidental take of marine mammals in this specific area or for this activity have not been issued under section 101(a)(5) of the Marine Mammal Protection Act and/or its 1994 Amendments. Following issuance of such regulations, the Service may amend this biological opinion to include an incidental take statement for marine mammals, as appropriate.

CONSERVATION RECOMMENDATIONS

Introductory paragraph: Section 7(a)(1) of ESA directs Federal agencies to utilize their authorities to further the purposes of ESA by carrying out conservation programs for the benefit of endangered and threatened species. Conservation recommendations are discretionary agency activities to minimize or avoid adverse effects of a proposed action on listed species or critical habitat, to help implement recovery plans, or to develop information.

Closing paragraph: In order for the Service to be kept informed of actions minimizing or avoiding adverse effects or benefitting listed species or their habitats, the Service requests notification of the implementation of any conservation recommendations.

REINITIATION - CLOSING STATEMENT

This concludes formal consultation and conference on the action(s) outlined in the (request/reinitiation request). As provided in 50 CFR §402.16, reinitiation of formal consultation is required where discretionary Federal agency involvement or control over the action has been maintained (or is authorized by law) and if: (1) the amount or extent of incidental take is exceeded; (2) new information reveals effects of the agency action that may affect listed species or critical habitat in a manner or to an extent not considered in this opinion; (3) the agency action is subsequently modified in a manner that causes an effect to the listed species or critical habitat that was not considered in this opinion; or (4) a new species is listed or critical habitat designated that may be affected by the action. In instances where the amount or extent of incidental take is exceeded, any operations causing such take must cease pending reinitiation.

You may ask the Service to adopt the conference opinion incorporated in this consultation as a biological opinion issued through formal consultation if the (species is listed/critical habitat is designated). The request must be in writing. If the Service reviews the proposed action and finds that there have been no significant changes in the action as planned or in the information used during the conference, the Service will adopt the conference opinion as the biological opinion on the project and no further section 7 consultation

will be necessary.

After (listing of the (species) as endangered/threatened and/or designation of critical habitat for (species)) and any subsequent adoption of this conference opinion, the (agency) shall request reinitiation of consultation if: (1) the amount or extent of incidental take is exceeded; (2) new information reveals effects of the agency action that may affect the species or critical habitat in a manner or to an extent not considered in this conference opinion; (3) the agency action is subsequently modified in a manner that causes an effect to the species or critical habitat that was not considered in this conference opinion; or (4) a new species is listed or critical habitat designated that may be affected by the action.

The incidental take statement provided with this conference opinion does not become effective until the species is listed and the conference opinion is adopted as the biological opinion issued through formal consultation. At that time, the project will be reviewed to determine whether any take of the (species) has occurred. Modifications of the opinion and incidental take statement may be appropriate to reflect that take. No take of the (species) may occur between the (listing of the (species) and the adoption of the conference opinion through formal consultation, or the completion of a subsequent formal consultation.

LITERATURE CITED

Outline of an early consultation package, including standardized statements

Address

Dear. . .

Introductory paragraph: The U.S. Fish and Wildlife Service (Service) has reviewed the (project plans, permit application, etc.) for the following activity (name or designation for the action) located in (County or State). Your (date) request was received on (date). This document represents the Service's preliminary biological opinion on the effects of that action on (species) in accordance with section 7 of the Endangered Species Act of 1973, as amended (16 U.S.C. 1531 et seq.).

This preliminary biological opinion is based on information provided in the (date) biological assessment (or evaluation), the (date) draft environmental assessment (or environmental impact statement), the (date) project proposal, telephone conversations of (dates) with (names), field investigations, and other sources of information. A complete administrative record of this consultation is on file in (this office/elsewhere).

CONSULTATION HISTORY

PRELIMINARY BIOLOGICAL OPINION

DESCRIPTION OF PROPOSED ACTION

STATUS OF THE SPECIES (range wide and/or recovery unit)

ENVIRONMENTAL BASELINE (in the action area)

Status of the Species

Effects of the Action

Cumulative Effects

Introductory paragraph: Cumulative effects include the effects of future State, local or private actions that are reasonably certain to occur in the action area considered in this preliminary biological opinion. Future Federal actions that are unrelated to the proposed action are not considered in this section because they require separate consultation pursuant to section 7 of ESA.

PRELIMINARY CONCLUSION

After reviewing the current status of (species), the environmental baseline for the action area [use if different from the range of the species], the effects of the proposed (action) and the cumulative effects, it is the

Service's preliminary biological opinion that the (action), as proposed, (is/is not) likely to jeopardize the continued existence of the (species), and (is/is not) likely to destroy or adversely modify designated critical habitat. **[If no critical habitat has been designated for the species or the action will not affect designated critical habitat, use one of the following statements.]** No critical habitat has been designated for this species, therefore, none will be affected. -OR- Critical habitat for this species has been designated at (location), however, this action does not affect that area and no destruction or adverse modification of that critical habitat is anticipated.

REASONABLE AND PRUDENT ALTERNATIVES (as appropriate)

Introductory paragraph: Regulations (50 CFR §402.02) implementing section 7 define reasonable and prudent alternatives as alternative actions, identified during consultation, that (1) can be implemented in a manner consistent with the intended purpose of the action, (2) can be implemented consistent with the scope of the action agency's legal authority and jurisdiction, (3) are economically and technologically feasible, and (4) would, the Service believes, avoid the likelihood of jeopardizing the continued existence of listed species or resulting in the destruction or adverse modification of critical habitat.

Closing paragraph: Because this preliminary biological opinion has found (jeopardy/destruction or adverse modification of critical habitat), the (agency) is required to notify the Service of its final decision on the implementation of the reasonable and prudent alternatives if this preliminary biological opinion is later confirmed as a final biological opinion.

INCIDENTAL TAKE STATEMENT

Introductory paragraph: Sections 4(d) and 9 of ESA, as amended, prohibit taking (harass, harm, pursue, hunt, shoot, wound, kill, trap, capture or collect, or attempt to engage in any such conduct) of listed species of fish or wildlife without a special exemption. Harm is further defined to include significant habitat modification or degradation that results in death or injury to listed species by significantly impairing behavioral patterns such as breeding, feeding, or sheltering. Harass is defined as actions that create the likelihood of injury to listed species to such an extent as to significantly disrupt normal behavior patterns which include, but are not limited to, breeding, feeding or sheltering. Incidental take is any take of listed animal species that results from, but is not the purpose of, carrying out an otherwise lawful activity conducted by the Federal agency or the applicant. Under the terms of section 7(b)(4) and section 7(o)(2), taking that is incidental to and not intended as part of the agency action is not considered a prohibited taking provided that such taking is in compliance with the terms and conditions of this incidental take statement.

The measures described below are non-discretionary, and must be implemented by the agency, if this preliminary biological opinion is confirmed through formal

consultation, so that they become binding conditions of any grant or permit issued to the applicant, as appropriate, in order for the exemption in section 7(o)(2) to apply. The (agency) has a continuing duty to regulate the activity covered by this incidental take statement. If the (agency) (1) fails to require the applicant to adhere to the terms and conditions of the incidental take statement through enforceable terms that are added to the permit or grant document, and/or (2) fails to retain oversight to ensure compliance with these terms and conditions, the protective coverage of section 7(o)(2) may lapse.

If the preliminary biological opinion finds jeopardy or adverse modification without a reasonable and prudent alternative, the introductory statement is as follows: As the preliminary biological opinion finds that the proposed action will result in (likely jeopardy to the species/destruction or adverse modification of critical habitat), and no reasonable and prudent alternative can be identified, any incidental taking is prohibited by section 9 of ESA.

Special provisions for plants, as appropriate: Sections 7(b)(4) and 7(o)(2) of ESA do not apply to the incidental take of listed plant species. However, protection of listed plants is provided to the extent that ESA requires a Federal permit for removal or reduction to possession of endangered plants from areas under Federal jurisdiction, or for any act that would remove, cut, dig up, or damage or destroy any such species on any other area in knowing violation of any regulation of any State or in the course of any violation of a State criminal trespass law. **[Include citations to appropriate State laws if helpful.]**

AMOUNT OR EXTENT OF TAKE

Incidental take statement when no take is anticipated: The Service does not anticipate that the proposed action will incidentally take any (species).

Incidental take statement where the biological opinion is jeopardy and incidental take still is anticipated: (For opinions with only one reasonable and prudent alternative): The Service has developed the following incidental take statement based on the premise that the reasonable and prudent alternative will be implemented.

(For opinions with more than one reasonable and prudent alternative, provide separate estimates of anticipated take, reasonable and prudent measures and terms and conditions, as appropriate): The Service has developed the following incidental take statement based on the premise that the reasonable and prudent alternative number XX will be implemented.

Introductory statement for amount and extent of take: The Service anticipates (number of individuals of (species)) could be taken as a result of this proposed action. Or the Service anticipates that individuals of (species) could be taken as a result of this proposed action due to (describe extent of relevant habitat degradation or disruption). The incidental take is expected to be in the form of (harm, harass, kill, etc.). **[Separately specify take**

will be harm or harass or kill or some other form of take.]

[Provide a concise summary of the analysis leading to this determination.]

OR

The Service anticipates incidental take of (species) will be difficult to detect for the following reason(s): [Incidental take of actual species' numbers may be difficult to detect when the species is wide-ranging; has small body size; finding a dead or impaired specimen is unlikely; losses may be masked by seasonal fluctuations in numbers or other causes, (e.g., oxygen depletions for aquatic species); or the species occurs in habitat (e.g., caves) that makes detection difficult]. However, the following level of take of this species can be anticipated by loss [quantify] of (surrogate species, food, cover, other essential habitat element such as water quantity or quality, or symbiont) because: [provide an explanation].

Bald eagles: If incidental take of bald eagles is anticipated, document that take, but add the following statement. [Note: This statement ends discussion of bald eagles in the incidental take statement.] The incidental take of bald eagles is not authorized by the Bald and Golden Eagle Protection Act. Therefore such take will not be authorized by this incidental take statement.

EFFECT OF THE TAKE

The opinion is no jeopardy/no adverse modification: In the accompanying preliminary biological opinion, the Service determined that this level of anticipated take is not likely to result in jeopardy to the species or destruction or adverse modification of critical habitat.

The opinion contains reasonable and prudent alternatives: In the accompanying preliminary biological opinion, the Service determined that this level of anticipated take is not likely to result in jeopardy to the species or destruction or adverse modification of critical habitat when (one of) the reasonable and prudent alternative(s) is implemented.

REASONABLE AND PRUDENT MEASURES (as appropriate)

Standardized introductory paragraph for reasonable and prudent measures for species other than marine mammals: The Service believes the following reasonable and prudent measure(s) are necessary and appropriate to minimize take: [Go on to list these measures.]

Standard paragraph for incidental take of marine mammals: [Note: The Marine Mammal Protection Act Amendments of 1994, authorize incidental take of marine mammals in the form of "harassment" for non-commercial fishing activities, (without the issuance of activity-specific regulations), and permits for death/injury incidental take for commercial fishing activities under certain circumstances. Regulations implementing these amendments are anticipated

early in 1995. Further guidance on standardized statements for these activities will be provided at that time.] After area-specific or activity-specific regulations have taken effect: Pursuant to section 101(a)(5) of the Marine Mammal Protection Act, as amended in 1994, and implementing regulations at 50 CFR §18.27, the following measures are required to be consistent with the total taking allowable under the area/activity specific regulations at 50 CFR §18.27(_) [insert appropriate citation] and to effect the least practical adverse impact on the species and its habitat and on the availability of the species for subsistence uses: [Cite measures identified in specific regulations and/or letters of authorization or permits for commercial fishing]. Pursuant to section 7(b)(4) of the Endangered Species Act, the following reasonable and prudent measures are necessary and appropriate to minimize take:

[Go on to list the measures, followed by the standard paragraph for terms and conditions.]

TERMS AND CONDITIONS

Introductory paragraph for terms and conditions: In order to be exempt from the prohibitions of section 9 of ESA, the (agency) must comply with the following terms and conditions, which implement the reasonable and prudent measures described above. These terms and conditions are nondiscretionary.

[Go on to list these terms and conditions, including requirements for monitoring, reporting, review, and disposition of any specimens.]

Disposition paragraph for pesticide situations: The U.S. Fish and Wildlife Service (in the Region of the species' occurrence) must be notified by (action agency) immediately of any dead or sick individuals found in or adjacent to pesticide-treated areas. Cause of death or illness, if known, also should be conveyed to these offices. [List appropriate Regional contact].

The Service has provided a protocol for the handling of dead, injured or ill listed species for pesticide analysis. When the (agency) suspects a species has been taken in violation of label restrictions, the incident(s) shall be reported to the U.S. Fish and Wildlife Service, Division of Law Enforcement or their designee in the Region in which the species is found. Instructions for proper handling and disposition of such specimens will be issued by the Division of Law Enforcement. [Include Law Enforcement contacts for appropriate Region(s).]

[The referenced protocol for pesticide situations can be found in Appendix F.]

Monitoring for pesticides (EPA or FDA): The agency shall monitor incidental take to ensure compliance with anticipated take levels as required by 50 CFR §402.14(i)(3). The Service believes that a label or bulletin requirement for users to immediately report any dead or sick listed species found in or adjacent to pesticide use areas would assist the (Environmental Protection Agency/Food and Drug Administration) in meeting this requirement. Such a

requirement provides an incentive to the user to report such incidents to remain exempt from section 9 taking provisions. However, the Service also believes the agency should strengthen its information gathering base by obtaining assistance from State or Federal wildlife or plant agencies, the Extension Service, Department of Agriculture cooperatives or educational or private organizations in reporting possible listed species take from pesticides.

Review requirement: The reasonable and prudent measures, with their implementing terms and conditions, are designed to minimize incidental take that might otherwise result from the proposed action. With implementation of these measures the Service believes that no more than (number or extent) will be incidentally taken. If, during the course of the action, this minimized level of incidental take is exceeded, such incidental take would represent new information requiring review of the reasonable and prudent measures provided. The Federal agency must immediately provide an explanation of the causes of the taking and review with the Service the need for possible modification of the reasonable and prudent measures.

Closing statement

If take is anticipated: Because the proposed action is likely to have adverse effects on listed species, the Service has included an incidental take statement pursuant to section 7(b)(4) of ESA. However, because this is an early consultation on the prospective action, this incidental take statement does not eliminate the (agency)'s liability under the taking prohibitions of section 9 of ESA. Instead, this statement provides your agency with foreknowledge of the terms and conditions that would be required if this prospective application is filed with your agency. These reasonable and prudent measures and implementing terms and conditions become effective only after the Service confirms the preliminary biological opinion as a final biological opinion on the prospective action.

Closing statement for listed migratory birds: Notice: While the incidental take statement provided in this consultation satisfies the requirements of the Endangered Species Act, as amended, it does not constitute an exemption from the prohibitions of take of listed migratory birds under the more restrictive provisions of the Migratory Bird Treaty Act.

Standard paragraph for incidental take of marine mammals: [Note: The Marine Mammal Protection Act Amendments of 1994 authorize incidental take of marine mammals in the form of "harassment" for non-commercial fishing activities, (without the issuance of activity-specific regulations), and permits for death/injury incidental take for commercial fishing activities under certain circumstances. Regulations implementing these amendments are anticipated early in 1995. Further guidance on standardized statements for these activities will be provided at that time. Before area- or activity-specific regulations are promulgated: The Service is not including an incidental take authorization for marine mammals at this time because the regulations required for incidental take of marine mammals in this specific area or for this

activity have not been issued under section 101(a)(5) of the Marine Mammal Protection Act and/or its 1994 Amendments. Following issuance of such regulations, the Service may amend this biological opinion to include an incidental take statement for marine mammals, as appropriate.

CONFERENCE REPORT/CONFERENCE NOTICE (as appropriate)

CONSERVATION RECOMMENDATIONS

Introductory paragraph: Section 7(a)(1) of ESA directs Federal agencies to utilize their authorities to further the purposes of ESA by carrying out conservation programs for the benefit of endangered and threatened species. Conservation recommendations are discretionary agency activities to minimize or avoid adverse effects of a proposed action on listed species or critical habitat, to help implement recovery plans, or to develop information.

Closing paragraph: In order for the Service to be kept informed of actions minimizing or avoiding adverse effects or benefitting listed species or their habitats, the Service requests notification of the implementation of any conservation recommendations.

REINITIATION - CLOSING STATEMENT

This concludes early consultation for (action). You may ask the Service to confirm this preliminary biological opinion as a final biological opinion on the prospective action once you receive the permit application from the prospective applicant. The request must be in writing. If the Service reviews the proposed action and finds that there are no significant changes in the action as planned or in the information used during the early consultation, it will confirm the preliminary biological opinion as a final biological opinion on the project and no further section 7 consultation will be necessary except when one of the following criteria for reinitiation are met: (1) the amount or extent of incidental take is exceeded; (2) new information reveals effects of the agency action that may affect listed species or critical habitat in a manner or to an extent not considered in this opinion; (3) the agency action is subsequently modified in a manner that causes an effect to the listed species or critical habitat that was not considered in this opinion; or (4) a new species is listed or critical habitat designated that may be affected by the action. In instances where the amount or extent of incidental take is exceeded, any operations causing such take must cease pending reinitiation.

If the Service does not confirm this preliminary biological opinion as a final biological opinion on the prospective action, the (agency) is required to initiate formal consultation with the Service.

LITERATURE CITED

A sample letter to prospective applicants about early consultation rights.

Dear _____:

This responds to your letter of _____ , ____, concerning the upcoming proposed experimental use of _____ _____. This agricultural chemical was previously used in (State) under the U.S. Environmental Protection Agency's (EPA) Experimental Use Permit (EUP) ___-EUP-__ _.

We have enclosed a general list of all endangered, threatened, and proposed species in (State), organized by county, for planning purposes. When specific test plots have been designated, EPA should consult with this office pursuant to section 7(a)(2) of the Endangered Species Act of 1973, as amended, prior to the issuance of the EUP for _____.

The enclosed list constitutes technical assistance only. It does not fulfill EPA's requirements pursuant to section 7 of the Endangered Species Act of 1973, as amended; only EPA or their non-Federal designee can fulfill those requirements. By copy of this letter, EPA's Office of Pesticide Programs is being made aware of their responsibility to consult with the Fish and Wildlife Service to insure that any action it authorizes, funds, or carries out is not likely to jeopardize the continued existence of listed species or result in destruction or adverse modification of critical habitat. We hope the resulting dialogue between EPA and the Service will provide registrants and permittees with better guidance on compliance with the Endangered Species Act. If EPA chooses not to consult, the Service cannot be certain that EPA, and your project, has complied with the provisions of the Endangered Species Act.

Nevertheless, you should be aware that, pursuant to Section 7(a)(3) of the Endangered Species Act, you have certain rights as an applicant for a Federal permit or license. Section 7(a)(3) and implementing regulations at 50 C.F.R. §402.11 establish a process called "early consultation", which was specifically designed to reduce the likelihood of conflicts between listed species or critical habitat and prospective actions such as yours. Although the consultation would be between EPA and the Service, your office can be involved throughout the early consultation process.

Copies of the specific regulations pertaining to early consultations are enclosed. If you have reason to believe that your proposal, which will eventually be included in an application for Federal agency approval, may affect listed species or critical habitat, you can ask the Federal agency issuing a permit or license (in this case it is EPA) to enter into early consultation with the Service.

Your request must be in writing and must certify that: (1) you have a definitive proposal outlining your action and its effects, and (2) that you intend to carry out your proposal if it is authorized. When EPA receives your proposal, they are required by the Endangered Species Act to initiate early consultation with the Service.

If you have questions regarding our comments, please contact (Biologist) at (___) ___-____.

Outline of an emergency consultation package, including standardized statements

Address

Dear. . .

Introductory statement: The U.S. Fish and Wildlife Service (Service) has reviewed the (name or designation for the action) located in (County or State). Your (date) request was received on (date). This document represents the Service's emergency consultation on the effects of that action on (species) in accordance with section 7 of the Endangered Species Act of 1973, as amended, (16 U.S.C. 1531 et seq.).

This biological opinion is based on information provided in the (date) biological assessment (or evaluation), the (date) draft environmental assessment (or environmental impact statement), the (date) project proposal, telephone conversations of (dates) with (names), field investigations, and other sources of information. A complete administrative record of this consultation is on file in (this office/elsewhere).

CONSULTATION HISTORY

BIOLOGICAL OPINION

DESCRIPTION OF PROPOSED ACTION

STATUS OF THE SPECIES (range wide and/or recovery unit)

ENVIRONMENTAL BASELINE (in the action area)

Status of the Species

Effects of the Action

[Document previous Service recommendations]

Cumulative Effects

Cumulative effects include the effects of future State, local or private actions that are reasonably certain to occur in the action area considered in this biological opinion. Future Federal actions that are unrelated to the proposed action are not considered in this section because they require separate consultation pursuant to section 7 of ESA.

CONCLUSION

After reviewing the current status of (species), the environmental baseline for the action area [use if different from the range of the species], the

effects of the (action) and the cumulative effects, it is the Service's biological opinion that the (action), as implemented, (is/is not) likely to jeopardize the continued existence of the (species), and (is/is not) likely to destroy or adversely modify designated critical habitat. [If no critical habitat has been designated for the species or the action will not affect designated critical habitat, use one of the following statements.] No critical habitat has been designated for this species, therefore, none will be affected. -OR- Critical habitat for this species has been designated at (location), however, this action does not affect that area and no destruction or adverse modification of that critical habitat is anticipated.

REASONABLE AND PRUDENT ALTERNATIVES (as appropriate)

[Include only if further action can restore/enhance species/critical habitat to a level below the jeopardy/adverse modification threshold.]

Introductory paragraph: Regulations (50 CFR §402.02) implementing section 7 define reasonable and prudent alternatives as alternative actions, identified during formal consultation, that (1) can be implemented in a manner consistent with the intended purpose of the action, (2) can be implemented consistent with the scope of the action agency's legal authority and jurisdiction, (3) are economically and technologically feasible, and (4) would, the Service believes, avoid the likelihood of jeopardizing the continued existence of listed species or resulting in the destruction or adverse modification of critical habitat.

INCIDENTAL TAKE STATEMENT

Introductory paragraph: Sections 4(d) and 9 of ESA, as amended, prohibit taking (harass, harm, pursue, hunt, shoot, wound, kill, trap, capture or collect, or attempt to engage in any such conduct) of listed species of fish or wildlife without a special exemption. Harm is further defined to include significant habitat modification or degradation that results in death or injury to listed species by significantly impairing behavioral patterns such as breeding, feeding, or sheltering. Harass is defined as actions that create the likelihood of injury to listed species to such an extent as to significantly disrupt normal behavior patterns which include, but are not limited to, breeding, feeding or sheltering. Incidental take is any take of listed animal species that results from, but is not the purpose of, carrying out an otherwise lawful activity conducted by the Federal agency or the applicant. Under the terms of section 7(b)(4) and section 7(o)(2), taking that is incidental to and not intended as part of the agency action is not considered a prohibited taking provided that such taking is in compliance with the terms and conditions of this incidental take statement.

Standardized statements for incidental take in emergencies: Successful implementation of Service recommendation: On (date), the Service provided the (agency) with the following measures for minimizing the take of (species/habitat): [describe measures provided - or reference, if documented earlier in the consultation]. As the (agency) implemented those measures in

its response to the emergency, the requirements for exemption from the taking provisions of section 9 have been met.

Partial success: On (date), the Service provided the (agency) with the following measures for minimizing the take of (species/habitat): **[describe measures provided - or reference, if documented earlier in the consultation].** To the extent that the (action agency) implemented those measures in its response to the emergency, the requirements for exemption from the taking provisions of section 9 have been met. Any take resulting from incomplete compliance with measures provided by the Service is not covered by the exemption.

No prior contact or the agency failed to implement the measures provided: As the (agency) (did not contact the Service to determine the measures to be taken or failed to implement the measures necessary to minimize take of) (species/habitat) during the response to the emergency, any take resulting from the response action does not constitute an exempted take under section 9 of ESA.

CONFERENCE REPORT/CONFERENCE NOTICE (as appropriate)

CONSERVATION RECOMMENDATIONS

Include recommendations that may help protect listed species and their habitats in future emergency situations or initiate beneficial actions that can be taken to conserve the species.

Introductory paragraph: Section 7(a)(1) of ESA directs Federal agencies to utilize their authorities to further the purposes of ESA by carrying out conservation programs for the benefit of endangered and threatened species. Conservation recommendations are discretionary agency activities to minimize or avoid adverse effects of a proposed action on listed species or critical habitat, to help implement recovery plans, or to develop information.

Closing paragraph: In order for the Service to be kept informed of actions minimizing or avoiding adverse effects or benefitting listed species or their habitats, the Service requests notification of the implementation of any conservation recommendations.

REINITIATION - CLOSING STATEMENT = **none, if discretionary Federal agency involvement has terminated**

LITERATURE CITED

Emergency consultation notification memorandum to the Regional Office (optional)

Memorandum

To: Assistant Regional Director, Ecological Services

From: Field Supervisor, (name of Field Office)

Subject: Emergency consultation on (name of Federal action).

This office has completed an informal emergency consultation. The following information summarizes the location of the emergency, nature of the emergency, listed species and critical habitat(s) involved, and how those species and habitats are likely to be affected by the emergency.

Date of the Contact: Time:

Contact(s) Name:

Agency:

Contact(s) Title:

Nature of the Emergency:

Species in the Area:

Anticipated Effects:

Recommendations Given to the Contact:

INTRA-SERVICE SECTION 7 BIOLOGICAL EVALUATION FORM

[Note: This form provides the outline of information needed for consultation. If additional space is needed, attach additional sheets, or set up this form to accommodate your responses.]

Originating Person: _____
Telephone Number: _____
Date: _____

I. Region:

II. Service Activity (Program)

III. Pertinent Species and Habitat:

A. Listed species and/or their critical habitat within the action area:

B. Proposed species and/or proposed critical habitat within the action area

C. Category 1 candidate species within the action area:

D. Include species/habitat occurrence on a map.

IV. Geographic area or station name and action:

V. Location (attach map):

A. County and State:

B. Section, township, and range (or latitude and longitude):

C. Distance (miles) and direction to nearest town:

VI. Description of proposed action (attach additional pages as needed):

VII. Determination of effects:

A. Explanation of effects of the action on species and critical habitats in items III.A, B, and C (attach additional pages as needed):

B. Explanation of actions to be implemented to reduce adverse effects:

VIII. Effect determination and response requested: [* optional]

A. Listed species/critical habitat:

Determination	Response requested
no effect (species: _____)	___*Concurrence
is not likely to adversely affect (species: _____)	___Concurrence ___*Formal Consultation
is likely to adversely affect (species: _____)	___Formal consultation

B. Proposed species/proposed critical habitat:

Determination	Response requested
no effect (species: _____)	___*Concurrence
is not likely to adversely affect (species: _____)	___ Concurrence
is likely to adversely affect (species: _____)	___Informal conference
is likely to jeopardize/adverse modification of critical habitat (species: _____)	___Conference

C. Category 1 candidate species:

Determination	Response requested
no effect (species: _____)	___*Concurrence
is not likely to adversely affect (species: _____)	___ Concurrence
is likely to adversely affect (species: _____)	___Informal conference
is likely to jeopardize (species: _____)	___Conference

IX. Reviewing ESO Evaluation:

A. Concurrence _____ Noncurrence _____

B. Formal consultation required _____

C. Conference required _____

D. Remarks (attach additional pages as needed):

_____ _____
signature date
[Title/office of reviewing official]

INSTRUCTIONS

Originating Person: The person(s) who prepared the Intra-Service Section 7 Biological Evaluation Form.

Date: Date the information on the form was finalized.

I Region: Self-explanatory.

II Service activity: The Service program initiating the proposed action.

III Pertinent species and habitat.

(A) Listed species and/or their critical habitat within the action area: The action area includes the immediate area where the proposed action will occur as well as any other areas where direct or indirect impacts of the action may be expected. For example, effects of an action in the headwaters of a stream may affect endangered fish that occur 20 miles downstream. Lists of listed species/critical habitats that possibly could occur in the action area may be generated by the Project Leader or may be requested from the appropriate ESO.

Note: For purposes of section 7 consultation, experimental populations of listed species are treated as listed species on national wildlife refuges or national parks, but as proposed species if classed as experimental non-essential populations off National Wildlife Refuge or National Park System lands.

List all threatened and endangered species and critical habitat that will or may be affected by the proposed action. An effect exists even if only one individual or habitat segment may be affected. Consider both beneficial and adverse effects, regardless of their magnitude.

List all threatened and endangered species and critical habitats in the action area that will not be affected at any level of significance. This informs the reviewer that such species have been considered.

(B) Proposed species and/or proposed critical habitat within the action area: Lists of proposed species and critical habitat that could occur in the action area may be generated by the project leader or may be requested from the appropriate ESO.

List all species and habitats in the action area for which a proposed rule (but not a final rule) to list as threatened or endangered or designate as critical habitat has been published in the Federal Register and which (1) may be affected, and (2) will not be affected, by the proposed action. Use the same consideration as in Item III.A above.

(C) Category 1 candidate species within the action area: Lists of such candidate species that could occur in the action area may be generated by the project leader or may be requested from the appropriate ESO.

List all category 1 species that will or may be affected by the proposed action. Candidate species are listed in category 1 of the Notices of Review published in the Federal Register. Because additions to and changes in category are made to the candidate list between the typically biannual printings of the Notice of Review, it is necessary to check candidate lists with the appropriate ESO.

List all category 1 species in the action area that will not be affected by the proposed action.

IV Geographic area or station name and action:

Briefly describe the proposed action and where it will occur. (For example: The proposed action is to directly stock, or transfer to the State of X for stocking, channel catfish and smallmouth bass. These stockings would occur in both Blue Water and Minnow River drainages). A more detailed description of the proposed action will be presented under Section VI.

V Location (attach map):

In addition to the following four specific descriptions, it is vital to attach a map(s). The reviewer may not be familiar with the project area and will need the maps to precisely relate the proposed project to the affected species. Maps should depict, preferably in large scale, the exact locations of project elements. The maps should include section, township, and range, or latitude and longitude. Topographic maps are preferred, with the action area depicted on them.

(A) County and State: Self-explanatory.

(B) Section, township, and range (or latitude and longitude):

Locate the project area as precisely as possible. If the action is stocking a small stock tank, the descriptor should include at least quarter section and preferably quarter/quarter section. For scattered project sites, such as in fish stocking, a location should be given for each site.

(C) Distance (miles) and direction to nearest town: Self-explanatory.

(D) Species/habitat occurrence: Depict on the location map the species and habitat occurrences.

VI Description of proposed action:

What is the purpose of this proposed action and how do you plan to do it? Describe the project area and the project. This should be detailed enough so that the reviewer can fully understand what the components of the action include and how the project will affect the species of concern. Do not assume that the reviewing office will understand procedures that are taken for granted within your program. Details can be provided here or by attaching copies of project plans, management plans, stocking schedules, or other project documents. National Environmental Protection Act documents are usually helpful attachments. Sketches or blueprints of the proposed action should be attached. Proposed project dates should be provided. Attach a biological assessment if the project is considered a "major construction activity." Include any measures agreed to through informal consultation to reduce any adverse impacts.

VII Determination of effects

A. Explanation of effects of the action:

Discuss either the effects of the action on each listed, proposed, or candidate species and critical habitat in the action area or why those species or critical habitats will not be affected. For species or critical habitats affected by the proposed action provide the following information: [Note: Candidate species will have no proposed critical habitat.]

(1) Status of species in action area - is it native (natural and stocked) or non-native in the action area? Population and/or distribution trends (provide survey information).

(2) Species habitat in the action area and their significance to spawning, feeding, migratory habits (or behavior), cover, roost, etc. Is the area currently occupied or historic range for the species?

(3) Impacts of the proposed action on species and/or critical habitat - how the proposed action will or may affect the species and or critical habitat considering direct, indirect, interdependent, interrelated, and cumulative impacts.

(4) Quantification of effects - acres of habitat, miles of habitat, number of individuals, etc.

(5) Summary of effects - include the basis for your conclusion - best judgment, literature, citations, studies, etc.

B. Describe, if known, project modifications that would promote the conservation of the affected species. Project modification ideas may be found in recovery plans. Although section 7 of ESA prohibits only those actions by Federal agencies which are likely to jeopardize listed species or adversely modify critical habitat, the Service has a commitment to recovering listed species and trying to ensure that other species do not need to be added to the list of endangered and threatened species.

VIII. Effect determination and response requested:

Enter the species in the appropriate determination. For each determination, place an X on the response requested.

A. Listed species/critical habitat:

No effect. This conclusion is reached if the proposed action and its interrelated and interdependent actions will not directly or indirectly affect listed species or critical habitat. Formal section 7 consultation is not required when the "no effect" conclusion is reached. A request for the optional written concurrence is encouraged.

Is not likely to adversely affect. This conclusion is appropriate when effects to the species or critical habitat are expected to be beneficial, discountable, or insignificant. Beneficial effects have contemporaneous positive effects without any adverse effects to the species or habitat. Insignificant effects relate to the size of the impact (and should never reach the scale where take occurs), while discountable effects are those that are extremely unlikely to occur. Based on best judgment, a person would not: (1) be able to meaningfully measure, detect, or evaluate insignificant effects; or (2) expect discountable effects to occur. If the ESO concurs in writing with the Project Leader's determination of "is not likely to adversely affect" listed species or critical habitat, the section 7 consultation process is completed.

If formal section 7 consultation is required for other species affected by this proposed action, then it may be easier and less confusing to fold the "is not likely to adversely effect" concurrence into the formal section 7 consultation rather than doing a separate concurrence.

Is likely to adversely affect. This conclusion is reached if any adverse effect to listed species or critical habitat may occur as a direct or indirect result of the proposed action or its interrelated or interdependent actions. In the event the overall effect of the proposed action is beneficial to the listed species or critical habitat, but may also cause some adverse effects to individuals of the listed species or segments of the critical habitat, then the proposed action "is likely to adversely affect" the listed species or critical habitat. An "is likely to adversely affect" determination requires formal section 7 consultation.

Example: A refuge proposes prescribed burning of a portion of a prairie remnant to improve the habitat for the endangered Karner blue butterfly. The burn will substantially improve the habitat for the species and promote its recovery in subsequent years. However, individual Karner blue butterfly eggs and larvae will be killed during the burn. Even though the net effect of the burn will be highly beneficial to the listed species, the burn must be considered to have an adverse effect. A finding of "is likely to adversely affect" is necessary.

B. Proposed species/proposed critical habitat:

No effect. This conclusion is appropriate for a proposed species or proposed critical habitat when no effects are expected. A request for optional written concurrence is encouraged.

Is not likely to adversely affect. This conclusion is appropriate when all effects to a proposed species or proposed critical habitat are expected to be beneficial, discountable, or insignificant. Beneficial effects have contemporaneous positive effects without any adverse effects to the species or habitat. Insignificant effects relate to the size of the impact (and should never reach the scale where take occurs), while discountable effects are those that are extremely unlikely to occur. Based on best judgment, a person would not: (1) be able to meaningfully measure, detect, or evaluate insignificant effects; or (2) expect discountable effects to occur. Written concurrence is recommended.

Is likely to adversely affect. This conclusion is reached if any adverse effects to the proposed species or critical habitat may occur as a result of the direct or indirect effects of the proposed action or its interrelated or interdependent actions. In the event the overall effect of the proposed action is beneficial to proposed species or proposed critical habitat, but may also cause some adverse effect to individuals of the proposed species or segments of the proposed critical habitat, then the proposed action "is likely to adversely affect" the proposed species or proposed critical habitat. This finding does not require a conference, but discussion is encouraged with the appropriate ESO to provide an informal opportunity to suggest ways in which the adverse effects can be minimized.

Is likely to jeopardize proposed species/adversely modify proposed critical habitat. For proposed species and proposed critical habitats, the Service is required to evaluate whether the proposed action is likely to jeopardize the proposed species or destroy or adversely modify the proposed critical habitat. If this conclusion is reached, a section 7 conference is required. For additional guidance on what constitutes jeopardy to a proposed species and destruction or adverse modification of proposed critical habitat, see the definition section or contact the appropriate ESO.

C. Category 1 candidate species:

No effect: This conclusion is reached if the proposed action and its interrelated and interdependent actions will not directly or indirectly affect category 1 candidate species. A request for the optional written concurrence is encouraged.

Is not likely to adversely affect. This conclusion is appropriate when all effects to a category 1 candidate are expected to be beneficial, discountable, or insignificant. Beneficial effects have contemporaneous positive effects without any adverse effects to the species or habitat. Insignificant effects relate to the size of the impact (and should never reach the scale where take occurs), while discountable effects are those that are extremely unlikely to occur. Based on best judgment, a person would not: (1) be able to meaningfully measure, detect, or evaluate insignificant effects; or (2) expect discountable effects to occur. Written concurrence is recommended.

Is likely to adversely affect. This conclusion is reached if any adverse effects to the category 1 candidate may occur as a result of the direct or indirect effects of the proposed action or its interrelated or interdependent actions. In the event the overall effect of the proposed action is beneficial to the category 1 candidate species, but may also cause some adverse effect to individuals of the species, the correct finding would be that the proposed action "is likely to adversely affect" the candidate species. This finding does not require a conference, but discussion is encouraged with the appropriate ESO to provide an informal opportunity to suggest ways in which the adverse effects can be minimized.

Is likely to jeopardize proposed category 1 candidate species: For category 1 candidate species, the Service is required to evaluate whether the proposed action is likely to jeopardize the category 1 candidate species. If this conclusion is reached, a section 7 conference is required. For guidance on what constitutes jeopardy to a category 1 candidate species, see the definitions section or contact the appropriate ESO.

APPENDIX C - EXAMPLES OF CONSULTATION

NOTE: Opinions following this new fomat will be provided as examples in the final version of the handbook

APPENDIX D - SOLICITOR OPINIONS

Secretarial Memoranda

S-1 Office of Hearings and Appeals Authority on Biological Opinions Issued by the U.S. Fish and Wildlife Service Under Section 7 of the Endangered Species Act. Manuel Lujan January 7, 1993.

S-2 Reaffirmation of above from Bruce Babbitt. April 20, 1993.

Solicitor Opinions

NOTE:Included in this appendix are two lists of legal opinions on sections 6, 7, and 9 of the Endangered Species Act, reviewed for a recent FOIA request. The first list (SO-A) contains those documents released to the requestors as public documents. These documents may be released to the public. List SO-B contains opinions that were, and are not to be, released to the public. If copies of any of these opinions are needed, requests should be sent through the Regional Office.

SO-1 Fish and Wildlife Service Regulations Defining "Harm" under Section 9 of the Endangered Species Act. April 17, 1981.

SO-2 HUD Delegation of Endangered Species Act Consultation Requirements. June 9, 1981.

SO-3 Cumulative Effects to be considered Under Section 7 of the Endangered Species Act. August 27, 1981.

SO-4 Request for Legal Opinion Concerning Section 7 Consultation for Mining Claim Land Patented by the BLM (Bureau of Land Management) March 1, 1990.

SO-5 The Legal Sufficiency of the Biological Opinion for Inner-Perimeter Road, Lowndes County, Georgia. July 9, 1992.

[Note: These opinions are not available in electronic format.]

THE SECRETARY OF THE INTERIOR

WASHINGTON

January 8, 1993

Memorandum

To: Assistant Secretary for Policy, Management and Budget

From: Secretary

Subject: Office of Hearings and Appeals Authority on Biological Opinions Issued by the U.S. Fish and Wildlife Service Under Section 7 of the Endangered Species Act

The Department's Office of Hearings and Appeals (OHA) has recently received numerous appeals of Bureau of Land Management (BLM) grazing decisions based on Section 7 biological opinions issued by the Fish and Wildlife Service (FWS). Appellants-permittees are asserting that the FWS opinions are arbitrary and capricious and may not be relied upon by the BLM in its decision-making process.

In one written opinion, an Administrative Law Judge handling one of these appeals for OHA found that BLM's reliance on biological advice provided by the FWS under Section 7 of the Endangered Species Act (ESA) was arbitrary and capricious. In effect, this ruling represents a review not only of the merits of the BLM decision, which is appropriate, but a review of the merits of the FWS biological advice as well.

These types of challenges to the FWS's Section 7 process (i.e., biological opinions and findings) have the effect of amending existing delegations of authority within the Department. Under the existing delegations set out in 209 DM 6 and 242 DM 1.1A, the Director of the U.S. Fish and Wildlife Service is authorized to exercise the authority of the Secretary concerning matters relating to the endangered and threatened species. Joint regulations promulgated by the Department of Commerce and the Department of the Interior vest responsibility in the Regional Directors of the FWS to carry out consultations and to issue biological opinions under Section 7 of the ESA (subject to review by the Director, at his election). 50 C.F.R. §§ 402.02 (definition of "Director") and 402.14. Neither the Departmental Manual nor the regulations at 50 C.F.R. Part 402 provide an administrative appeal remedy to interested parties.

In summary, OHA has no authority under existing delegations to review the merits of FWS biological opinions. Any review of biological opinions would necessarily be limited to the federal district courts pursuant to Section 11(g) of the ESA. The long-standing administrative practice of not providing OHA review of the biological determinations of the FWS under the ESA, the specific remedies provided by the ESA itself, and the need for expedited treatment, all militate against a change to the existing delegations.

APPENDIX D - SOLICITOR OPINIONS

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5-

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In one written opinion, an Administrative Law Judge handling one of these appeals for OHA found that BLM's reliance on biological advice provided by the FWS under Section 7 of the Endangered Species Act (ESA) was arbitrary and capricious. In effect, this ruling represents a review not only of the merits of the BLM decision, which is appropriate, but a review of the merits of the FWS biological advice as well.

These types of challenges to the FWS's Section 7 process (i.e., biological opinions and findings) have the effect of amending existing delegations of authority within the Department. Under the existing delegations set out in 209 DM 6 and 242 DM 1.1A, the Director of the U.S. Fish and Wildlife Service is authorized to exercise the authority of the Secretary concerning matters relating to the endangered and threatened species. Joint regulations promulgated by the Department of Commerce and the Department of the Interior vest responsibility in the Regional Directors of the FWS to carry out consultations and to issue biological opinions under Section 7 of the ESA (subject to review by the Director, at his election). 50 C.F.R. §§ 402.02 (definition of "Director") and 402.14. Neither the Departmental Manual nor the regulations at 50 C.F.R. Part 402 provide an administrative appeal remedy to interested parties.

In summary, OHA has no authority under existing delegations to review the merits of FWS biological opinions. Any review of biological opinions would necessarily be limited to the federal district courts pursuant to Section 11(g) of the ESA. The long-standing administrative practice of not providing OHA review of the biological determinations of the FWS under the ESA, the specific remedies provided by the ESA itself, and the need for expedited treatment, all militate against a change to the existing delegations.

This memorandum does not affect the discretion of Departmental bureaus on how to best implement a biological opinion from the FWS. Consistent with case law and Section 7 regulations, the action agency determines how to implement the opinion, giving due deference to the biological findings of the FWS. The issue is whether OHA, instead of limiting its review to the merits of the BLM decision, should be allowed to look behind that decision and review the merits of the FWS biological opinion. When BLM decides to implement a reasonable and prudent alternative set out in a biological opinion, or if it decides to implement the mandatory terms and conditions of an incidental take statement attached to that opinion, OHA is not authorized to "second-guess" the biological opinion or findings of FWS when reviewing BLM's decision to adopt the measures prescribed in that opinion or advice. As stated above, OHA has not been delegated the authority to carry out such a review.

Please inform the Director of the Office of Hearings and Appeals of my position on this subject and, accordingly, the present limits on the jurisdiction of OHA in this regard.

THE SECRETARY OF THE INTERIOR

WASHINGTON

APR 20 1993

Memorandum

To: Office of Hearings and Appeals

From: Secretary BB

Subject: Office of Hearings and Appeals Authority to Review Biological Opinions Issued by the U.S. Fish and Wildlife Service Pursuant to Section 7 of the Endangered Species Act

It has been the policy of the Department of the Interior, reaffirmed by Secretary Lujan as recently as January 8, 1993, that the Office of Hearings and Appeals (OHA) does not have authority to review biological opinions issued under section 7 of the Endangered Species Act (ESA). The Office of Hearings and Appeals included this policy in its list of items for 90-day review. That policy remains in effect.

Thus, for example, if the Bureau of Land Management (BLM) decides to implement a reasonable and prudent alternative set forth in a FWS biological opinion, or if BLM implements the mandatory terms of a biological opinion, OHA is not entitled to "second-guess" the FWS findings in the guise of reviewing the BLM decision. Any review of FWS biological opinions is limited to the federal courts pursuant to the review mechanism created by Congress in section 11(g) of the Endangered Species Act. 16 U.S.C. section 1540(g).

Please take the steps necessary to insure that OHA complies with this policy immediately.

ESA LEGAL MEMORANDA
RELEASED DOCUMENTS
INTERIM RESPONSE TO CROWELL & MORING FOIA REQUEST

DIVISION OF CONSERVATION AND WILDLIFE

Aug. 30, 1974	Letter from Associate Solicitor to Chairman, Committee on Merchant Marine and Fisheries, concerning Section 9 burdens on legitimate zoos and circuses under the current ESA.
Feb. 13, 1976	Memorandum from Assistant Solicitor, Fish and Wildlife, to Associate Director, Federal Assistance, FWS, re designation of critical habitat for foreign species.
Apr. 12, 1977	Memorandum from Associate Solicitor to Director, FWS, re extraterritorial/foreign application of ESA; applicability of the jeopardy clause of Section 7 to federal activities affecting listed species in foreign countries.
May 18, 1977 withdrawn	Memorandum from Assistant Solicitor, Fish and Wildlife, to Chief, FWS/Law Enforcement, re whether hybrids are covered by the ESA of 1973.
July 14, 1977	Memorandum from Acting Associate Solicitor to Associate Director, Federal Assistance, FWS, re applicability of the concept of mitigation to critical habitat under Section 7.
Aug. 2, 1977 withdrawn	Memorandum from Assistant Solicitor, Fish and Wildlife, to Deputy Associate Director, Federal Assistance, FWS, on whether hybrids are covered by the ESA.
Aug. 22, 1977	Letter from Associate Solicitor to Assistant County Solicitor, Anne Arundel County, Maryland, re conflicts with the ESA in Maryland's proposed animal control ordinance.
Sept. 16, 1977	Memorandum from Assistant Solicitor, Fish and Wildlife, to Associate Director, Federal Assistance, FWS, re permit issuance in cases where it is not clear whether the animal is a purebred or a hybrid (with attachment).
Dec. 13, 1977	Letter from Associate Solicitor to Director, Government Affairs for Land and Natural

	Resources, National Cattlemen's Ass'n, re scope of Sections 4(d) and 7.
Jan. 19, 1979	Memorandum from Associate Solicitor to the Endangered Species Committee, re statutory standard and criteria for granting an exemption from the requirements of Section 7(a) of the ESA.
Mar. 21, 1979	Letter from Assistant Solicitor, Fish and Wildlife, to Counsel, Seminole Tribe of Florida, re Indian tribe's proposal to raise alligators in captivity for commercial purposes.
June 25, 1979	"Comments of the Department of the Interior on Prehearing Issues," In re The Pittston Co. Proposed Refinery and Marine Terminal, Eastport, Maine (Endangered Species Committee Review Board).
July 23, 1979	Memorandum from Associate Solicitor to Solicitor, re extraterritorial application of § 7 of the ESA.
July 25, 1979	Letter from Assistant Solicitor, Fish and Wildlife, to Mass. State Rep. Manning, re Massachusetts law and Section 6 of the ESA.
Apr. 30, 1980	Letter from Assistant Solicitor, Fish and Wildlife, to Ms. Sharon Gordon, re Section 7.
July 1, 1980	Letter from Assistant Solicitor, Fish and Wildlife, to the Attorney General, State of Rhode Island, re Rhode Island's eligibility for a full authorities cooperative agreement for fish and wildlife under the ESA of 1973.
July 24, 1980	Letter from Associate Solicitor to Mr. Lindell Marsh, re conservation planning and Section 7.
Sept. 12, 1980	Letter from Assistant Solicitor, Fish and Wildlife, to Executive Secretary, Joint Legislative Air and Water Pollution Control and Conservation Committee, House of Representatives, State of Pennsylvania, re requirements for cooperative agreement for plants.
Nov. 10, 1980	Letter from Assistant Solicitor, Fish and Wildlife, to Mr. John S. Applegarth,

	Department of Biology, University of New Mexico, re application of ESA Section 9 prohibitions to prehistoric faunal remains of listed species.
Nov. 12, 1980	Letter from Assistant Solicitor, Fish and Wildlife, to J. Applegarth, Department of Biology, University of New Mexico, re application of ESA Section 9 prohibitions to prehistoric faunal remains of listed species.
* Apr. 17, 1981	Memorandum from Associate Solicitor to Director, FWS, re FWS regulation defining "harm" under Section 9.
May 6, 1981 withdrawn	Memorandum from Assistant Solicitor, Fish and Wildlife, to Associate Director, Federal Assistance, FWS, re the availability of protections for hybrids of listed species under the ESA.
* Aug. 27, 1981	Memorandum from Associate Solicitor to Director, FWS, re revised Solicitor's Office opinion on cumulative impact analysis.
Aug. 31, 1981	Memorandum from Associate Solicitor to Assistant Secretary, Fish and Wildlife and Parks, re extraterritorial/foreign application of Section 7 of the ESA.
Dec. 30, 1981	Memorandum from Associate Solicitor to Associate Director, Federal Assistance, FWS, re the interrelationship of Sections 7 and 9 of the ESA.
Sept. 21, 1983 withdrawn	Memorandum from Assistant Solicitor, Fish and Wildlife, to Regional Solicitor (Boston), re status of the hybrid offspring of two endangered species.
Dec. 19, 1983	Memorandum from Associate Solicitor to Director, FWS, re Section 10(j) of the ESA and its relationship with § 7 and § 9 of the ESA and the Marine Mammal Protection Act; translocation of sea otters.
Jan. 26, 1984	Letter from D. Gayer, Fish and Wildlife Branch, to J. Clifford, Assistant Attorney General, Civil Division, Office of the Attorney General, State of Arizona, re § 6 cooperative agreement.

Aug. 21, 1984	Memorandum from Associate Solicitor, through Regional Solicitor (Atlanta), to Regional Director, Region 4, FWS, re applicability of § 7(a)(2) to the issuance of flood insurance under the National Flood Insurance Act of 1968 (FEMA program).
Aug. 24, 1984	Memorandum from Assistant Solicitor, Fish and Wildlife, to Associate Director, Federal Assistance, FWS, re augmentation of the Southern Selkirk Mountain caribou herd.
May 13, 1987	Memorandum from Associate Solicitor to Director, FWS, re petition to list the Samish Tribe.
July 1987	"Federal Legal Measures for Protection of Fish and Wildlife in the Bering Sea Region," D. Gayer & M. Young, Office of the Solicitor.
Sept. 18, 1989	Letter from Associate Solicitor to Acting Chief, Wildlife and Marine Resources Section, DOJ, re legal position of the FWS concerning the effect of the Arizona-Idaho Conservation Act on the duty and power to reinitiate Sec. 7 consultation.
Mar. 6, 1990	Letter from Associate Solicitor to Acting Chief, Wildlife and Marine Resources Section, DOJ, re legal position on the effect of the Arizona-Idaho Conservation Act on § 7 of the ESA.

ESA LEGAL MEMORANDA - CHRONOLOGICAL LIST
OF DOCUMENTS COVERED BY CROWELL & MORING FOIA REQUEST

IMMEDIATE OFFICE OF THE SOLICITOR

Feb. 7, 1975	Letter from Solicitor to Terri Lowry, re federal laws for natural resource protection.
Mar. 27, 1975	Letter from Solicitor to General Counsel, GSA, re seizure and forfeiture remedies under the ESA for violations thereof.
July 31, 1975	Memorandum from Deputy Solicitor to Acting Secretary, re effect of the ESA on preference right lease applications (with attached research memorandum).
Nov. 5, 1975	Memorandum from Deputy Solicitor to Associate Solicitors Garner, Metrinko, and Chambers, re applicability of Section 7 to Indian Reservations (with attachments).
Feb. 3, 1976	Letter from Solicitor to Rep. Udall, re the Section 7 consultation process for Tellico Dam and the Department's efforts to protect the snail darter.
Mar. 4, 1976	Memorandum from Deputy Solicitor to Regional Solicitor (Sacramento), re applicability of Section 7 to Indian reservations.
Nov. 10, 1976	Memorandum fror Deputy Solicitor to Assistant Secretary, Program Development and Budget, re NEPA, Section 7 of the ESA, and the balance between Mining and Minerals Policy Act and the ESA.
Dec. 28, 1976	Memorandum from Solicitor to Assistant Secretary, Program Development and Budget, re review of the ESA.
Jan. 3, 1977	Memcrandum from Solicitor, through Assistant Secretary - Program Development and Budget, to the Secretary, re review of ESA.
Apr. 14, 1977	Letter from Solicitor to Office of the Solicitor General, DOJ, re comments on the proposed petition for certiorari in the Snail Darter case.
July 14, 1977	Letter from Solicitor to Assistant Attorney General, Office of Legal Advisor, re ESA issues involved in Hill v. TVA (petition for writ of certiorari pending).

May 25, 1978	Memorandum from Deputy Solicitor to Director, FWS, re Section 7 and cumulative impacts.
June 5, 1978	Memorandum from Solicitor to Director, FWS, re cumulative impacts and § 7 of the ESA.
June 13, 1978	Memorandum from Deputy Solicitor to Director, FWS, re cumulative impacts and § 7 of the ESA.
July 3, 1978	Letter from Solicitor to Assistant Attorney General, Land and Natural Resources Division, re litigation report for Safari Club International v. Andrus.
July 19, 1978	Memorandum from Solicitor to Director, FWS, re Section 7 and Cumulative Impacts.
July 24, 1978	Memorandum from Solicitor to Director, FWS, re Section 7 and Cumulative Impacts.
Oct. 24, 1978	Letter from Solicitor to Assistant Attorney General, Land and Natural Resources Division, re Interior Department position in the litigation on the Grayrocks project.
Oct. 30, 1978	Letter from Solicitor to Assistant Attorney General, Land and Natural Resources Division, re litigation report in Hopson v. Kreps (class action filed by Eskimos attacking Commerce Department regulatory restrictions on the taking of bowhead whales).
Dec. 27, 1978	Memorandum from Deputy Solicitor to Director, Geological Survey, re proposed interagency agreements designating lead agencies for § 7 consultations.
Feb. 8, 1980	Letter from Deputy Solicitor to Assistant Attorney General, Land and Natural Resources Division, re district court decision in North Slope Borough v. Andrus, National Wildlife Federation v. Andrus, and Village of Kaktovik v. Andrus (D.D.C.) [injunction issued against offshore oil and gas leases in the Beaufort Sea].
June 13, 1980	Memorandum from Solicitor, through the Executive Secretariat, to the Secretary, re Secretarial Issue Document on inadequate information situations and the draft Section 7 regulations.

Nov. 4, 1980	Memorandum from Solicitor to Assistant Secretary for Fish and Wildlife and Parks and Assistant Secretary for Indian Affairs, re application of the ESA to Native Americans with treaty hunting and fishing rights.
Nov. 7, 1980	Memorandum from Solicitor to Executive Secretariat, re sufficiency of data in preparing biological opinions under § 7.
Jan. 8, 1981	Letter from Deputy Solicitor, Legal Services, to Assistant Attorney General, Land and Natural Resources Division, re comments on district court decision in Glover River Organization v. Department of Interior, No. 78-202-C (E.D. Okla., Dec. 12, 1980).
Aug. 26, 1981	Memorandum from Solicitor to Director, FWS, re withdrawal of earlier Solicitor's Opinion on cumulative impact analysis under § 7.
Jan. 8, 1982	Memorandum from Solicitor, Assistant Secretary for Energy and Minerals, and Assistant Secretary for Land and Water Resources to Secretary, re recommended legislative amendments to the ESA.
Jan. 19, 1982	Letter from Solicitor to Sen. Inouye, re applicability of ESA to the Northern Mariana Islands, Trust Territory of the Pacific Islands.
Mar. 30, 1982	Letter from Deputy Solicitor to D. Santarelli, Esq., re importation of sport-hunted leopard trophies.
June 14, 1982	Letter from Solicitor to Assistant Attorney General, Land and Natural Resources Division, re Interior Department position on the need for litigation to protect two endangered species.
Oct. 12, 1982	Letter from Solicitor to Assistant Attorney General, Land and Natural Resources Division, re litigation position in Pyramid Lake Paiute Tribe of Indians v. City of Reno.
May 9, 1984	Memorandum from Deputy Solicitor to all Assistant Secretaries and all Bureau and Agency Directors, re consultation requirements under § 7(a)(2) of the ESA.
Feb. 11, 1985	Letter from Solicitor to Assistant Attorney General, Land and Natural Resources Division, re Interior Department position on the Eighth

	Circuit decision in United States v. Dion.
Apr. 12, 1985	Letter from Solicitor to Assistant Attorney General, Land and Natural Resources Division, re Fish and Wildlife Service position in City of Reno v. Pyramid Lake Paiute Tribe of Indians, Civ. No. CV-R-85-025 BRT (D. Nev.).
June 10, 1985	Letter from Acting Solicitor to Assistant Attorney General, Land and Natural Resources Division, re Interior Department position on the Eighth Circuit decision in United States v. Dion.
July 5, 1985	Letter from Principal Deputy Solicitor to President, Wildlife Legislative Fund of America, re federal wildlife conservation laws and treaty-protected hunting and fishing rights of Native Americans.
Nov. 18, 1985	Memorandum from Principal Deputy Solicitor to Secretary, re analysis of legal issues concerning the "Grasslands" in the Central Valley of California.
Jan. 10, 1986	Letter from Solicitor to Rep. Tauzin, re United States v. Dion.
Mar. 26, 1986	Letter from Solicitor to Rep. Foley, re United States v. Dion.
Dec. 31, 1986	Letter from Solicitor to Assistant Attorney General, Land and Natural Resources Division, re Interior Department position in Pyramid Lake Paiute Tribe of Indians v. Hodel.
July 7, 1987	Letter from Solicitor to Assistant Attorney General, Division of Land and Natural Resources, re Fish and Wildlife Service position on the district court order in United States v. City of Rancho Palos Verdes.
Feb. 18, 1988	Letter from Solicitor to Acting Assistant Attorney General, Land and Natural Resources Division, re Interior Department position on Ninth Circuit decision in Conner v. Burford.
Nov. 16, 1988	Letter from Solicitor to Assistant Attorney General, Division of Land and Natural Resources, re Interior Department position on the Eighth Circuit decision in Defenders of Wildlife v. Hodel.
Mar. 14, 1989	Letter from Solicitor to Acting Assistant Attorney General, Division of Land and

	Natural Resources, re Interior Department position on the district court order in Defenders of Wildlife v. Hodel.
July 10, 1989	Memorandum from Solicitor to Secretary, re authority to provide water to Stillwater Wildlife Management Area.
July 9, 1990	Memorandum from Acting Solicitor to Secretary, re separation of functions in matters handled by the Endangered Species Committee.
Sept. 4, 1990	Letter from Solicitor to Assistant Attorney General, Division of Environment and Natural Resources, re recommendations concerning Eighth Circuit decision in Defenders of Wildlife v. Lujan (§ 7 extraterritoriality case).

DIVISION OF ENERGY AND RESOURCES

Oct. 28, 1975	Memorandum from Assistant Solicitor, Lands, to Assistant Solicitor, Fish and Wildlife, re proposed guidelines for federal agency compliance with § 7 of the ESA.
Jan. 6, 1976	Memorandum from Associate Solicitor to Solicitor, re proposed guidelines for federal agency compliance with Section 7 of the ESA.
Aug. 10, 1976	Memorandum from Associate Solicitor to Assistant Secretary, Land and Water Resources, re application of the ESA to mineral leases.
Jan. 4, 1978	Memorandum from Associate Solicitor, through Assistant Secretary, Land and Water Resources, to Director, BLM, re relationship of ESA to actions under ANCSA.
June 27, 1980	Memorandum from Associate Solicitor to Director, BLM, re biological studies of endangered species occurring within areas of proposed agency action.
Oct. 29, 1980	Memorandum from Assistant Solicitor, Realty Branch, to Assistant Solicitor, Fish and Wildlife, re Section 7 consultation process for the Northern Border Gas Pipeline grant of right-of-way (with enclosures).
Feb. 6, 1981	Memorandum from Acting Associate Solicitor to Director, BLM, re legality of habitat compensation as an alternative under section 7.
Sept. 15, 1986	Memorandum from Assistant Solicitor, Water and Power, to Assistant Secretary for Water and Science and Commissioner of BoR, re Defenders of Wildlife v. Hodel.
Apr. 1, 1988	Memorandum from Associate Solicitor to Director, BLM, re legal responsibilities of BLM for oil and gas leasing and operations on split estate lands.
Oct. 25, 1989	Letter from Associate Solicitor to Assistant Attorney General, Land and Natural Resources

Division, re Natural Resources Defense Council v. Houston (with enclosures).

REGIONAL SOLICITOR'S OFFICE
ROCKY MOUNTAIN REGION

Aug. 22, 1979	Memorandum from Regional Solicitor to Regional Director, FWS (Denver), re applicability of § 7 to BIA activities.
Mar. 5, 1980	Memorandum from Regional Solicitor to Regional Director, FWS (Denver), re application of § 7 to Rural Electrification Administration processes (with attachment).
Mar. 14, 1980	Memorandum from Regional Solicitor to Regional Director, FWS (Denver), re use of surplus water in Glendo Reservoir for the conservation of whooping crane critical habitat.
May 2, 1980	Memorandum from Regional Solicitor to Regional Director, FWS (Denver), re Section 7 responsibilities for oil and gas leasing.
June 3, 1980	Memorandum from Regional Solicitor to Endangered Species Team Leader, FWS, Salt Lake City Area Office, re biological opinion for the Dolores Project.
June 23, 1980	Letter from Acting Regional Solicitor to Assistant U. S. Attorney, District of Colorado, re litigation report for Riverside Irrigation District v. Stippo.
June 27, 1980	Memorandum from Regional Solicitor to Dave Westley, FWS/Office of Endangered Species, Washington, DC, re ESA § 7 regulations.
Aug. 22, 1980	Letter from Acting Regional Solicitor to Assistant U. S. Attorney, District of Colorado, re additional information for the Government's defense in Riverside Irrigation District v. Stippo.
Oct. 14, 1980	Memorandum from Regional Solicitor to Regional Director, Fish and Wildlife, Denver (FA-SE), re responsibility to request initiation of consultation.
June 9, 1981	Memorandum from Regional Solicitor to Area Manager, FWS, Salt Lake City, re use of

	endangered plant species in highway right-of-way plantings.
June 9, 1981	Memorandum from Regional Solicitor to Assistant Regional Director, FWS, Region 6, Denver (AFA), re delegation of ESA consultation requirements by the Department of Housing and Urban Development.
July 8, 1981	Memorandum from Regional Solicitor to Associate Solicitor, Energy & Resources, and Associate Solicitor, Conservation & Wildlife, re "no surface occupancy" stipulations in oil and gas leases and § 7 of the ESA.
Sept. 25, 1981	Letter from M. Zallen (for the Regional Solicitor) to T. Hicklin, Lt. Colonel, Corps of Engineers, re consideration of cumulative effects in the biological opinion for Cheyenne Stage II Water Diversion Project.
Sept. 28, 1981	Memorandum from Regional Solicitor to Associate Solicitor, Conservation and Wildlife, re Montana § 6 cooperative agreement (with attachments).
Nov. 5, 1981	Memorandum from Regional Solicitor to Regional Director, FWS (Denver), re oil and gas leasing and ESA § 7 responsibilities.
Dec. 30, 1981	Memorandum from Regional Solicitor to Associate Solicitor, Conservation & Wildlife, re proposed changes to the ESA.
May 4, 1982	Memorandum from Regional Solicitor to Associate Solicitor, Conservation & Wildlife, re ESA § 7 and cumulative effects.
Nov. 8, 1982	Memorandum from Regional Solicitor to Field Supervisor, Endangered Species, FWS (Billings, MT), re § 7 consultation on Forest Highway 61 in Flathead County, Montana.
Dec. 14, 1982	Memorandum from Regional Solicitor to Assistant Solicitor, Fish and Wildlife, re Exxon biological opinion.
June 21, 1983	Memorandum from Regional Solicitor to Regional Director, FWS (Denver), re attracting or baiting grizzly bears.
Jan. 28, 1985	Memorandum from Regional Solicitor to Regional Director, FWS (Denver), re Center Mountain timber sale; 60-day notice of intent to sue.

May 6, 1985	Memorandum from Regional Solicitor to Special Assistant to the Regional Director, FWS (Denver), re endangered species modeling effort on the Colorado River.
Sept. 5, 1985	Memorandum from Regional Solicitor to Regional Director, FWS (Denver), re draft grizzly bear recovery plan revision.
Feb. 24, 1986	Memorandum from Regional Solicitor to Regional Director, FWS (Denver), re agency review draft of the revised Northern Rocky Mountain Wolf recovery plan.
Apr. 7, 1986	Memorandum from Regional Solicitor to Regional Director, FWS (Denver), re proposed rule to revise special regulations for the threatened grizzly bear.
Apr. 7, 1986	Memorandum from Regional Solicitor to Executive Director, Colorado River Coordinating Committee, FWS, Region 6 (Denver), re comments on draft program for endangered fishes in the Upper Colorado River Basin.
May 6, 1986	Memorandum from Regional Solicitor to W. Michael Young, Fish and Wildlife Branch, re removal of projects from the environmental baseline under § 7 (without enclosure).
June 11, 1986	Memorandum from Regional Solicitor to Regional Director, FWS (Denver), re proposed changes in the draft Northern Rocky Mountain Wolf recovery plan.
Aug. 21, 1987	Memorandum from Regional Solicitor to Deputy Regional Director, FWS (Denver), re importation of wolves from Canada (without enclosure).
Sept. 11, 1987	Memorandum from Regional Solicitor to Regional Director, FWS (Denver), re wolf control plan and environmental action memorandum.
Dec. 7, 1987	Memorandum from Regional Solicitor to Regional Director, FWS (Denver), re wolf control plan; environmental assessment.
Jan. 25, 1988	Memorandum from Regional Solicitor to Solicitor, re Conner v. Burford.
May 26, 1988	Memorandum from Regional Solicitor to Acting Associate Solicitor, Conservation and

	Wildlife, re instream flow water rights for Colorado River endangered fishes under Colorado law; proposed water sale from Ruedi Reservoir.
Dec. 29, 1988	Memorandum from Regional Solicitor to Associate Solicitor, Conservation and Wildlife, re 60-day notice of intent to sue filed by James Grizzard for the Uintah Mountain Club (without attachment).
Mar. 9, 1989	Memorandum from Regional Solicitor to Associate Solicitor, Conservation and Wildlife, re implementation of conservation measures in biological opinion for the sale of water from Ruedi Reservoir (with enclosures).
Apr. 25, 1989	Memorandum from Regional Solicitor to Regional Director, FWS (Denver), re proposed revision to grizzly bear special rule.
May 12, 1989	Memorandum from Regional Solicitor to Regional Director, FWS (Denver), re § 7 consultations and the Recovery Implementation Program for Endangered Fishes in the Upper Colorado River Basin.
May 18, 1989	Memorandum from Regional Solicitor to Regional Director, FWS (Denver), re proposed revision to grizzly bear special rule.
Sept. 19, 1989	Memorandum from Regional Solicitor to Regional Director, FWS (Denver), re listing package to propose the listing of the Barneby Ridgecress.
Sept. 20, 1989	Memorandum from Regional Solicitor to Regional Solicitor, Intermountain Region, re ESA § 7 and the Animas-La Plata Project (without enclosure).
Oct. 13, 1989	Memorandum from Regional Solicitor to Solicitor, re consultation procedures for relicensing of FERC Projects (Kingsley Dam) (with attachment).
Oct. 20, 1989	Memorandum from Regional Solicitor to Regional Director, FWS (Denver), re commercial log hauling through Yellowstone National Park; 60-day notice of intent to sue.
Feb. 22, 1990	Memorandum from Regional Solicitor to Regional Director, FWS (Denver), re BLM

		patent to the City of St. George, Utah.
*	Mar. 1, 1990	Memorandum from Regional Solicitor to Regional Director, FWS (Denver), re § 7 consultation for mining claim lands patented by the BLM.
	May 15, 1990	Memorandum from Regional Solicitor to Regional Director, FWS (Denver), re comments on Service's draft response to questions from the State of Montana on the wolf control program.
	Aug. 28, 1990	Memorandum from Regional Solicitor to Deputy Commissioner, Bureau of Reclamation (Denver); Regional Director, FWS (Denver); Regional Director, Nat'l Park Service, Rocky Mountain Region; Chief, Bureau of Mines (Denver); Director's Representative, USGS (Denver) [re ESA § 7 - responsibility to consult on projects in foreign countries (with attachment)].
	Sept. 13, 1990	Memorandum from Regional Solicitor to Solicitor, re Animas-La Plata Project and ESA.

REGIONAL SOLICITOR'S OFFICE
PACIFIC NORTHWEST REGION

Sept. 23, 1975	Memorandum from Office of the Regional Solicitor to Regional Director, FWS (Portland), re regulation of hunting on Grays Lake National Wildlife Refuge as affected by the presence of whooping cranes.
Dec. 14, 1981	Memorandum from Regional Solicitor to Regional Director, FWS (Portland), re legality of BIA's permittee control over lands near Grays Lake National Wildlife Refuge, and effect of proposed deepening of portions of Grays Lake.
June 22, 1981	Memorandum from Regional Solicitor to Regional Director, FWS (Portland), re proposed wildlife legislation of the Northern Marianas Commonwealth.
Jan. 11, 1982	Memorandum from Regional Solicitor to Associate Solicitor, Conservation and Wildlife, re ESA issues (with enclosure).
Mar. 27, 1985	Memorandum from Office of the Regional Solicitor to Assistant Regional Director, Federal Assistance, FWS (Portland), re EIS on application for an incidental take permit under § 10(a) of the ESA.
Sept. 6, 1985	Memorandum from R. Swan, Attorney, Pacific Northwest Region, Office of the Solicitor, to Regional Director, FWS (Portland), re DEIS for proposed permit to authorize incidental taking of Coachella Valley Fringe-toed Lizards.
Dec. 27, 1985	Memorandum from Office of the Regional Solicitor to Regional Director, FWS (Portland), re draft agreement for management of Coachella Valley Fringe-toed Lizard preserves.
Jan. 29, 1986	Memorandum from Office of the Regional Solicitor to Deputy Assistant Regional Director, Federal Assistance, FWS (Portland), re draft FEIS and management agreement for proposed permit to authorize incidental taking of Coachella Valley Fringe-toed

	Lizards.
Jan. 6, 1987	Memorandum from Office of the Regional Solicitor to Deputy Assistant Regional Director, Fish and Wildlife Enhancement, FWS (Portland), re draft memorandum of understanding with California on ESA § 7 consultations.
Jan. 7, 1987	Memorandum from Office of the Regional Solicitor to Deputy Assistant Regional Director, Fish and Wildlife Enhancement, FWS (Portland), re draft memorandum on ESA § 7 guidance (without enclosure).

REGIONAL SOLICITOR'S OFFICE
SOUTHEAST REGION

Mar. 23, 1978	Memorandum from Regional Solicitor to Regional Director, FWS (Atlanta), re MMPA and ESA relative to Florida (with attachment).
June 9, 1978	Memorandum from Regional Solicitor to Special Agent in Charge, Law Enforcement District 9, FWS (Atlanta), re definition of "industry or trade" (without enclosure).
Sept. 11, 1979	Letter from Regional Solicitor to W. T. Ponder, re taking under § 9 of the ESA.
Oct. 10, 1979	Memorandum from Regional Solicitor to ARD Federal Assistance, FWS (Atlanta), re § 6 cooperative agreement for Mississippi.
Oct. 26, 1979	Memorandum from Regional Solicitor to Assistant Regional Director, Federal Assistance, FWS (Atlanta), re authority of FWS to control the release of funds intended for an agency action which was the subject of consultation.
Nov. 15, 1979	Memorandum from Regional Solicitor to Assistant Regional Director, Federal Assistance, FWS (Atlanta), re § 6 cooperative agreement for plants for South Carolina.
Nov. 15, 1979	Memorandum from Regional Solicitor to Assistant Regional Director, Federal Assistance, FWS (Atlanta), re § 6 cooperative agreement for plants for Tennessee.
Nov. 15, 1979	Memorandum from Regional Solicitor to Assistant Regional Director, Federal Assistance, FWS (Atlanta), re § 6 cooperative agreement for plants for Georgia.
Jan. 7, 1980	Memorandum from Regional Solicitor to Assistant Regional Director, Federal Assistance, FWS (Atlanta), re federal cost-sharing under § 6.
Jan. 10, 1980	Memorandum from Regional Solicitor to Assistant Regional Director, Federal Assistance, re proposed cooperative agreement with U. S. Virgin Islands.

Apr. 28, 1980	Memorandum from Regional Solicitor to Regional Director, FWS (Atlanta), re mosquito control ditches on Merritt Island National Wildlife Refuge.
June 19, 1980	Memorandum from Assistant Regional Solicitor, Lands & Litigation, Southeast Region, to Assistant Solicitor, Fish and Wildlife, re permit issuance under the ESA and the Bald and Golden Eagle Protection Act (with enclosures).
Mar. 9, 1981	Memorandum from Regional Solicitor to Assistant Solicitor, Fish and Wildlife, re interpretation of § 7 (with attachments).
Mar. 12, 1981	Memorandum from J. McCulloh, Attorney-Advisor, Southeast Region, Office of the Solicitor, to Acting Regional Director, FWS (Atlanta), re biological opinion, Pigeon Roost Cave, Beaver Lake, Arkansas.
Feb. 16, 1983	Memorandum from Regional Solicitor to Regional Director, FWS (Atlanta), re Corps of Engineers' sale of lands for cottage sites, Clark's Hill Reservoir.
Mar. 14, 1986	Memorandum from Regional Solicitor to Regional Director, FWS (Atlanta), re responsibility of the State of Florida to prevent the unauthorized taking of the endangered Florida Panther.
Apr. 25, 1986	Memorandum from Regional Solicitor to Regional Director, FWS (Atlanta), re Puerto Rican Parrot project; state permit issue.
Oct. 26, 1989	Memorandum from Regional Solicitor to Regional Director, FWS (Atlanta), re endangered/threatened species permit authorizations.

ESA LEGAL MEMORANDA - CHRONOLOGICAL INDEX OF DOCUMENTS EXEMPTED FROM RELEASE

RESPONSE TO CROWELL & MORING FOIA REQUEST

DIVISION OF CONSERVATION AND WILDLIFE

Apr. 19, 1974 — Memorandum from Associate Solicitor to Assistant Secretary, Fish and Wildlife and Parks, re cooperative agreements, the transition period, and federal jurisdiction under the ESA.

Exemption (b)(5) applies: this document is protected by the attorney-client and deliberative process privileges.

Aug. 16, 1974 — Memorandum from Associate Solicitor to Legislative Counsel, re H.R. 15893 and H.R. 16079 (bills to amend the ESA).

Exemption (b)(5) applies because the above-described memorandum contains legal advice provided to an Interior Department official, which is protected by the attorney-client privilege.

Nov. 21, 1974 — Memorandum from Associate Solicitor to Legislative Counsel, re S. 4128 (a bill "To amend the Endangered Species Act of 1973 to make it more consistent with the Marine Mammal Protection Act of 1972").

Exemption (b)(5) applies because the above-described memorandum contains legal advice and recommendations provided to an Interior Department official, which is protected by the attorney-client and deliberative process privileges.

Dec. 2, 1974 — Memorandum from Associate Solicitor to Acting Associate Solicitor, Energy and Resources, re condemnation and the effect of the ESA on mining and mineral leasing laws.

Exemption (b)(5) applies: this document is protected by the attorney-client privilege.

Dec. 2, 1974 — Memorandum from Associate Solicitor to Deputy Solicitor, re CEQ guidelines and consultation.

Exemption (b)(5) applies; this document is protected by the attorney-client and deliberative process privileges.

Jan. 24, 1975 — Memorandum from Associate Solicitor to Solicitor, re application of the ESA to proposed preference right phosphate leases at Osceola National Forest.

Exemption (b)(5) applies; this document is protected by the attorney-client and deliberative process privileges.

Apr. 11, 1975 — Memorandum from Associate Solicitor to Assistant Sec'y for Fish and Wildlife and Parks, re Sec. 4(d) of the ESA and regulated taking of threatened species (with enclosures).

Exemption (b)(5) applies; this document is protected by the attorney-client and attorney work product privileges.

Apr. 23, 1975 — Memorandum from Assistant Solicitor, Fish and Wildlife, to Chief, Division of Federal Aid, FWS, re review of environmental impact statement for the endangered species program.

Exemption (b)(5) applies; this document is protected by the attorney-client and deliberative process privileges.

June 20, 1975 — Memorandum from Assistant Solicitor, Fish and Wildlife, to Deputy Assistant Secretary for Fish and Wildlife and Parks, re interpretation of Section 4(d) and regulated taking of threatened species.

Exemption (b)(5) applies; this document is protected by the attorney-client privilege.

July 16, 1975 — Memorandum from Assistant Solicitor, Fish and Wildlife, to Chief, Endangered Species, FWS, re Corps of Engineers Harvey Canal-Bayou Barataria Project.

Exemption (b)(5) applies; this document is protected by the attorney-client and deliberative process privileges.

July 31, 1975 — Memorandum from Assistant Solicitor, Fish and Wildlife, to Assistant Solicitor, Lands, Division of Energy and Resources, re Section 7, critical habitat, and the Fort Mohave, Nevada land transfer.

Exemption (b)(5) applies; this document is protected by the attorney-client privilege.

Sept. 17, 1975 — Memorandum from Assistant Solicitor, Fish and Wildlife, to Federal Aid, FWS, re the Freedom of Information Act and the ESA.

Exemption (b)(5) applies; this document is protected by the attorney-client privilege.

Dec. 16, 1975 — Memorandum from Assistant Solicitor, Fish and Wildlife, to Assistant Solicitor, Lands, re Orme Dam and the relationship between Section 7 and NEPA.

Exemption (b)(5) applies; this document is protected by the attorney-client and deliberative process privileges.

Dec. 16, 1975 — Memorandum from Assistant Solicitor, Fish and Wildlife, to Assistant Solicitor, Lands, re draft guidelines for federal agency implementation of Section 7 of the ESA.

Exemption (b)(5) applies because the above-described memorandum contains legal conclusions and advice exchanged between Interior Department attorneys concerning proposed agency guidelines; the document is protected by the attorney-client and deliberative process privileges.

Jan. 1976 — Memorandum from Associate Solicitor to Solicitor, re proposed Section 7 guidelines.

Exemption (b)(5) applies; this document is protected by the attorney-client and deliberative process privileges.

Apr. 15, 1976 — Memorandum from Assistant Solicitor, Fish and Wildlife, to Associate Director, Federal Assistance, FWS, re the National Environmental Policy Act and the endangered species program.

Exemption (b)(5) applies; this document is protected by the attorney-client and deliberative process privileges.

May 28, 1976 — Memorandum from Associate Solicitor to Solicitor, re application of the ESA to Indians.

Exemption (b)(5) applies; this document is protected by the attorney-client and deliberative process privileges.

Sept. 1, 1976 — Memorandum from Acting Associate Solicitor to Deputy Assistant Secretary, re Forest Service opinion on compliance with Section 7.

Exemption (b)(5) applies; this document is protected by the attorney-client privilege.

Sept. 7, 1976 — Memorandum from Assistant Solicitor, Fish and Wildlife, to Chief, Migratory Bird Management, FWS, re applicability of ESA to progeny of birds lawfully held upon date of enactment.

Exemption (b)(5) applies; this document is protected by the attorney-client privilege.

Nov. 3, 1976 — Memorandum from Assistant Solicitor, Fish and Wildlife, to Special Assistant to the Solicitor, re Section 7 court decisions.

Exemption (b)(5) applies; this document is protected by the attorney-client privilege.

Mar. 7, 1977 — Memorandum from Associate Solicitor to Acting Deputy Solicitor, re applicability of the ESA to Indians.

Exemption (b)(5) applies because the above-described memorandum contains legal discussion and advice conveyed from the Division of Conservation and Wildlife to the Acting Deputy Solicitor; the document is protected by the attorney-client and deliberative process privileges.

Apr. 14, 1977 — Memorandum from Associate Solicitor to Legislative Counsel, re comments on H.R. 4167, a bill to amend the Endangered Species Act of 1973 to clarify the provisions regarding federal agency cooperation.

Exemption (b)(5) applies; this document is protected by the attorney-client and deliberative process privileges.

Apr. 28, 1977 — Memorandum from Assistant Solicitor, Fish and Wildlife, to Associate Director, Federal Assistance, FWS, re Section 6(c) criteria for reviewing state cooperative agreement applications under the ESA of 1973.

Exemption (b)(5) applies; this document is protected by the attorney-client privilege.

July 8, 1977 — Memorandum from Assistant Solicitor, Fish and Wildlife, to Director, FWS, re effect of the Marine Mammal Protection Act on the ESA (permits).

Exemption (b)(5) applies; this document is protected by the attorney-client privilege.

Aug. 4, 1977 — Memorandum from Acting Associate Solicitor to Assistant Secretary for Fish and Wildlife and Parks, re the International Convention for the Regulation of Whaling and the taking of bowhead whales by Alaskan Natives.

Exemption (b)(5) applies; this document is protected by the attorney-client and deliberative process privileges.

Sept. 12, 1977 — Memorandum from Assistant Solicitor, Fish and Wildlife, to Director, FWS, re relationship between Executive Order 11987 ("Exotic Organisms") and the ESA of 1973.

Exemption (b)(5) applies; this document is protected by the attorney-client privilege.

Sept. 15, 1977 — Memorandum from Associate Solicitor to Solicitor, re applicability of ESA to Indian reservations.

Exemption (b)(5) applies because the above-described memorandum contains legal analysis and recommendations conveyed from the Division of Conservation and Wildlife to the Solicitor; the document is protected by the attorney-client and deliberative process privileges.

Oct. 6, 1977 — Memorandum from Assistant Solicitor, Fish and Wildlife, to Deputy Solicitor, re applicability of International Convention for the Regulation of Whaling to the aboriginal taking of whales.

Exemption (b)(5) applies because the above-described memorandum contains legal analysis and advice conveyed from the Branch of Fish and Wildlife to the Deputy Solicitor; the document is protected by the attorney-client and deliberative process privileges.

Feb. 14, 1978 — Letter from Associate Solicitor to Assistant Attorney General, Land and Natural Resources, re litigation report for Pacific Legal Foundation v. Andrus.

Exemption (b)(5) applies; this document is protected by the attorney-client and attorney work product privileges.

Mar. 15, 1978 — Memorandum from Assistant Solicitor, Fish and Wildlife, to Associate Director, Federal Assistance, FWS, re Section 7 intra-Service consultation.

Exemption (b)(5) applies; this document is protected by the attorney-client privilege.

Mar. 27, 1978 — Memorandum from Associate Solicitor to Regional Solicitor (Atlanta), re protection of marine mammals on inland waterways.

Exemption (b)(5) applies; this document is protected by the attorney-client privilege.

Apr. 28, 1978 — Letter from Associate Solicitor to Assistant Attorney General, Land and Natural Resources Division, re litigation report for Glover River Organization v. Dep't of the Interior.

Exemption (b)(5) applies; this document is protected by the attorney-client and attorney work product privileges.

June 6, 1978 — Memorandum from Assistant Solicitor, Fish and Wildlife, to Associate Director, Federal Assistance, FWS, re state participation in consultation under Section 7 of the ESA.

Exemption (b)(5) applies; this document is protected by the attorney-client privilege.

June 27, 1978 — Memorandum from Associate Solicitor to Associate Director, AFA/FWS, re federal agencies' affirmative conservation obligations under Section 7 and their relationship to the mitigation concept.

Exemption (b)(5) applies; this document is protected by the attorney-client privilege.

Aug. 14, 1978 — Memorandum from Assistant Solicitor, Fish and Wildlife, to Associate Director, Federal Assistance, re consideration of cumulative impacts in the Reno Sparks early start program endangered species consultation.

Exemption (b)(5) applies because the above-described memorandum contains legal analysis and advice provided to the FWS and protected by the attorney-client privilege.

Oct. 27, 1978 — Memorandum from Assistant Solicitor, Fish and Wildlife, to Director, FWS, re Freedom of Information Act and disclosure of data relating to endangered or threatened species.

Exemption (b)(5) applies; this document is protected by the attorney-client privilege.

Nov. 1, 1978 — Memorandum from Associate Solicitor to Solicitor, re Endangered Species Committee consideration of the Grayrocks and Tellico Projects.

Exemption (b)(5) applies because the above-described memorandum contains legal analysis conveyed by the Division of Conservation and Wildlife to the Solicitor; this document is protected by the attorney-client and deliberative process privileges.

Jan. 31, 1979 — Letter from Associate Solicitor to Assistant Attorney General, Land and Natural Resources Division, re litigation report for Colorado River Water Conservation District v. Andrus.

Exemption (b)(5) applies; this document is protected by the attorney-client and attorney work product privileges.

Feb. 8, 1979 — Note for the Solicitor from the Associate Solicitor, re endangered species exemption process.

Exemption (b)(5) applies because this document contains legal analysis provided by the Division of Conservation and Wildlife to the Solicitor; this document is protected by the attorney-client and deliberative process privileges.

Apr. 10, 1979 — Memorandum from Assistant Solicitor, Fish and Wildlife, to Associate Director, Federal Assistance, FWS, re review of papers on plant conservation under the ESA.

Exemption (b)(5) applies; this document is protected by the attorney-client and deliberative process privileges.

Apr. 13, 1979 — Memorandum from Assistant Solicitor, Fish and Wildlife, to Acting Deputy Associate Director, FWS, re ESA cooperative agreements.

Exemption (b)(5) applies; this document is protected by the attorney-client and deliberative process privileges.

May 29, 1979 — Memorandum from Associate Solicitor to Acting Project Manager, Alaska Natural Gas Transportation System, re Section 7 consultation and granting a right-of-way (Alaskan Natural Gas Transportation System).

Exemption (b)(5) applies; this document is protected by the attorney-client and deliberative process privileges.

Aug. 17, 1979 — Letter from Associate Solicitor to Assistant Attorney General, Land and Natural Resources Division, re supplement to litigation report in Montana Wilderness Association et al. v. U.S. Forest Service . . . U.S. Fish and Wildlife Service, et al. (duty of the Fish and Wildlife Service to consider secondary effects before rendering a biological opinion pursuant to Section 7(b)).

Exemption (b)(5) applies; this document is protected by the attorney-client and attorney work product privileges.

Aug. 31, 1979	Memorandum from Assistant Solicitor, Fish and Wildlife, to Chief, Office of Endangered Species, FWS, re Freedom of Information Act and disclosure of file data on critical habitat determinations under the ESA.
	Exemption (b)(5) applies; this document is protected by the attorney-client privilege.
Sept. 13, 1979	Memorandum from Assistant Solicitor, Fish and Wildlife, to Chief, Branch of Operations, Office of Endangered Species, re cooperative agreement between Fish and Wildlife Service and the Illinois Department of Conservation.
	Exemption (b)(5) applies; this document is protected by the attorney-client and deliberative process privileges.
Oct. 11, 1979	Memorandum from Assistant Solicitor, Fish and Wildlife, to Associate Director, Federal Assistance, FWS, re consideration of economic and other impacts in designation of critical habitat.
	Exemption (b)(5) applies; this document is protected by the attorney-client privilege.
Nov. 6, 1979	Memorandum from Assistant Solicitor, Fish and Wildlife, to Director, FWS, re permit requirements for prehistoric bones of endangered species.
	Exemption (b)(5) applies; this document is protected by the attorney-client privilege.
Nov. 21, 1979	Memorandum from Assistant Solicitor, Fish and Wildlife, to Director, FWS, re delegation of Secretarial authority to Fish and Wildlife Service officials under the ESA.
	Exemption (b)(5) applies; this document is protected by the attorney-client privilege.
Jan. 18, 1980	Letter from Acting Associate Solicitor to Deputy General Counsel, EPA, re proposal to amend the EPA consolidated permit regulations to incorporate the requirements of the ESA.
	Exemption (b)(5) applies; this document is protected by the attorney-client and deliberative process privileges.

Jan. 18, 1980	Memorandum from Acting Associate Solicitor to Regional Solicitor (Sacramento), re application of Section 7 of the ESA to BLM actions on oil drilling permit applications.	
	Exemption (b)(5) applies; this document is protected by the attorney-client privilege.	
Feb. 11, 1980	Memorandum from Assistant Solicitor, Fish and Wildlife, to Associate Director, Federal Assistance, FWS, re cumulative impacts and biological assessments under section 7(c).	
	Exemption (b)(5) applies; this document is protected by the attorney-client privilege.	
Mar. 5, 1980	Memorandum from Assistant Solicitor, Fish and Wildlife, to Associate Director, Federal Assistance, FWS, re the sufficient new information standard for reproposing withdrawn endangered species listings.	
	Exemption (b)(5) applies; this document is protected by the attorney-client privilege.	
Mar. 14, 1980	Memorandum from Assistant Solicitor, Fish and Wildlife, to Regional Solicitor (Boston), re meaning of "insure" in section 7 of the ESA; other Pittston legal questions.	
	Exemption (b)(5) applies; this document is protected by the attorney-client privilege.	
Apr. 4, 1980	Memorandum from Acting Associate Solicitor to Regional Solicitor (Denver), re BLM responsibilities for consultation pursuant to section 7.	
	Exemption (b)(5) applies; this document is protected by the attorney-client privilege.	
Apr. 9, 1980	Memorandum from Assistant Solicitor, Fish and Wildlife, to Associate Director, Federal Assistance, FWS, re Rhode Island's eligibility for cooperative agreements for fish, wildlife and plants.	
	Exemption (b)(5) applies; this document is protected by the attorney-client and deliberative process privileges.	

Apr. 16, 1980 — Memorandum from Assistant Solicitor, Fish and Wildlife, to Associate Director, Federal Assistance, FWS, re relationship between Freedom of Information Act and Endangered Species Act.

Exemption (b)(5) applies; this document is protected by the attorney-client privilege.

Apr. 28, 1980 — Memorandum from Assistant Solicitor, Fish and Wildlife, to Acting Chief, Office of Scientific Authority, re disclosure of protected species site information and informants' identities under FOIA.

Exemption (b)(5) applies; this document is protected by the attorney-client privilege.

May 5, 1980 — Memorandum from Assistant Solicitor, Fish and Wildlife, through Associate Director, Federal Assistance, FWS, to Chief, Federal Wildlife Permit Office, FWS, re special use permit for American alligator hides.

Exemptions (b)(5) and (b)(6) apply. This document is protected by the attorney-client and deliberative process privileges. The document also contains references to a private individual for which disclosure would involve a clearly unwarranted invasion of personal privacy.

May 9, 1980 — Memorandum from Assistant Solicitor, Fish and Wildlife, to Associate Director, Federal Assistance, FWS, re Army Corps of Engineers permit provisions concerning Endangered Species.

Exemption (b)(5) applies; this document is protected by the attorney-client privilege.

May 12, 1980 — Memorandum from Assistant Solicitor, Fish and Wildlife, to Associate Director, Federal Assistance, FWS, re legal review of proposed listing of U.S. range of five animal species.

Exemption (b)(5) applies; this document is protected by the attorney-client and deliberative process privileges.

May 22, 1980 — Letter from Acting Associate Solicitor to Director, Duty Assessment Division, U. S.

Customs Service, re possibility of a duty exemption for endangered species importation by the Dept. of the Interior.

Exemption (b)(5) applies; this document is protected by the attorney-client and deliberative process privileges.

June 4, 1980 — Memorandum from Assistant Solicitor, Fish and Wildlife, to Acting Associate Solicitor, re the cooperative agreement program under the ESA.

Exemption (b)(5) applies; this document is protected by the attorney-client privilege.

June 6, 1980 — Memorandum from Assistant Solicitor, Fish and Wildlife, to Associate Director, Federal Assistance, FWS, re Ohio's eligibility for an endangered species cooperative agreement for fish and wildlife.

Exemption (b)(5) applies; this document is protected by the attorney-client and deliberative process privileges.

July 16, 1980 — Memorandum from Associate Solicitor to Director, BLM, re comments on proposed 43 CFR 3809 concerning mining claims.

Exemption (b)(5) applies; this document is protected by the attorney-client and deliberative process privileges.

July 29, 1980 — Memorandum from Associate Solicitor to Solicitor, re application of the ESA to Native Americans with treaty hunting and fishing rights.

Exemption (b)(5) applies; this document is protected by the attorney-client and deliberative process privileges.

Aug. 14, 1980 — Note from C. Kaiser, Branch of Fish and Wildlife, to S. Kemnitzer, Office of the Secretary, re decision in Industrial Union Dep't. AFL-CIO v. American Petroleum Institute (the "Benzene Decision").

Exemption (b)(5) applies to this note because it contains legal analysis and advice protected by the attorney-client privilege.

Aug. 21, 1980 — Note from C. Kaiser, Branch of Fish and Wildlife, to S. Kamnitzer, Office of the Secretary, re "Benzene Decision."

Exemption (b)(5) applies to this note because it contains legal analysis and advice protected by the attorney-client privilege.

Aug. 27, 1980 — Memorandum from Assistant Solicitor, Fish and Wildlife, to Associate Director, Federal Assistance, FWS, re relationships between permit provisions of the ESA and the Bald and Golden Eagle Protection Act.

Exemption (b)(5) applies; this document is protected by the attorney-client privilege.

Aug. 29, 1980 — Memorandum from Assistant Solicitor, Fish and Wildlife, to Associate Director, Federal Assistance, FWS, re sea turtle conservation plan.

Exemptions (b)(5) and (b)(6) apply. This document is protected by the attorney-client and attorney work product privileges. The document also contains references to a private individual for which disclosure would involve a clearly unwarranted invasion of personal privacy.

Sept. 11, 1980 — Memorandum from Associate Solicitor to Regional Solicitor (Atlanta), re criminal prosecution for alleged harassment or harm of listed eagles.

Exemption (b)(5) applies to this memorandum because it contains legal analysis and recommendations provided by the Division of Conservation and Wildlife to the Regional Solicitor, Southeast Region; this document is protected by the attorney-client and deliberative process privileges.

Sept. 17, 1980 — Memoranda from Assistant Solicitor, Fish and Wildlife, to Associate Director, Federal Assistance, FWS, re Army Corps of Engineers' permit provisions for listed species.

Exemption (b)(5) applies; this document is protected by the attorney-client privilege.

Sept. 17, 1980 — Memorandum from Associate Solicitor to Associate Solicitor, Energy and Resources, re Section 7 consultation process and the Northern Border Gas Pipeline right-of-way grant.

Exemption (b)(5) applies; this document is protected by the attorney-client and deliberative process privileges.

Sept. 29, 1980 — Memorandum from Assistant Solicitor, Fish and Wildlife, to Associate Director, Federal Assistance, FWS, re legality of taking gray wolves in order to protect caribou reintroduced into the State of Minnesota.

Exemption (b)(5) applies; this document is protected by the attorney-client and deliberative process privileges.

Oct. 22, 1980 — Memorandum from Associate Solicitor to Solicitor, re § 7 standards (i.e., duty to "insure"; best available scientific and commercial data).

Exemption (b)(5) applies to this memorandum because it contains legal analysis and recommendations provided by the Division of Conservation and Wildlife to the Solicitor; this document is protected by the attorney-client and deliberative process privileges.

Oct. 23, 1980 — Memorandum from Assistant Solicitor, Fish and Wildlife, to Associate Director, Federal Assistance, FWS, re revocation of grazing permit for taking grizzly bears.

Exemption (b)(5) applies; this document is protected by the attorney-client privilege.

Nov. 10, 1980 — Memorandum from Assistant Solicitor, Fish and Wildlife, to Associate Director, Federal Assistance, FWS, re eligibility of Wyoming for limited authorities cooperative agreement for fish and wildlife.

Exemption (b)(5) applies; this document is protected by the attorney-client and deliberative process privileges.

Nov. 12, 1980 — Memorandum from Assistant Solicitor, Fish and Wildlife, to Associate Director, Federal Assistance, FWS, re eligibility of Wyoming for limited authorities cooperative agreement for fish and wildlife.

Exemption (b)(5) applies; this document is protected by the attorney-client and deliberative process privileges.

Nov. 17, 1980 — Letter from Associate Solicitor to Assistant Attorney General, Land and Natural Resources Division, re litigation report for DeKalb County Commission v. Andrus.

Exemption (b)(5) applies; this letter is protected by the attorney-client and attorney work product privileges.

Dec. 3, 1980 — Memorandum from Associate Solicitor to Albert A. Kashinski, General Law, re comments on Allen-Warner Valley Energy System Secretarial Issue Document (SID).

Exemption (b)(5) applies; this document is protected by the attorney-client and deliberative process privileges.

Dec. 11, 1980 — Letter from Associate Solicitor to Assistant Attorney General, Land and Natural Resources Division, re litigation report for Cabinet Mountains Wilderness/Scotchman's Peak Grizzly Bears v. Peterson.

Exemption (b)(5) applies; this letter is protected by the attorney-client and attorney work product privileges.

Dec. 24, 1980 — Memorandum from Associate Solicitor to Associate Solicitor, Energy and Resources, re habitat donation under Section 7.

Exemption (b)(5) applies; this document is protected by the attorney-client privilege.

Jan. 6, 1981 — Memorandum from Assistant Solicitor, Fish and Wildlife, to Associate Director, Federal Assistance, FWS, re Vermont proposed ESA legislation and state cooperative agreements.

Exemption (b)(5) applies; this document is protected by the attorney-client and

deliberative process privileges.

Jan. 8, 1981 — Memorandum from Associate Solicitor to Albert A. Kashinski, General Law, re comments on Allen-Warner Valley Energy System Secretarial Issue Document.

Exemption (b)(5) applies; this document is protected by the attorney-client and deliberative process privileges.

Jan. 9, 1981 — Memorandum from Assistant Solicitor, Fish and Wildlife, to Associate Director, Federal Assistance, FWS, re Freedom of Information Act and whether draft biological opinions may be exempted from release.

Exemption (b)(5) applies; this document is protected by the attorney-client privilege.

Feb. 2, 1981 — Memorandum from Assistant Solicitor, Fish and Wildlife, to Associate Director, Federal Assistance, FWS, re ESA permit and registration applications under 50 CFR § 17.21(g) and § 17.22; do notice and comment requirements under § 10(c) apply to registrations under § 17.21(g)?

Exemption (b)(5) applies; this document is protected by the attorney-client privilege.

Feb. 24, 1981 — Letter from D. Cannon, Fish and Wildlife Branch, to K. Fuller, DOJ, re kangaroo legislative history.

Exemption (b)(5) applies; this letter is protected by the attorney-client and attorney work product privileges.

Mar. 9, 1981 — Memorandum from Acting Associate Solicitor to Solicitor and Director, FWS, re standard of judicial review for biological opinions.

Exemption (b)(5) applies; this document is protected by the attorney-client privilege.

Apr. 1, 1981 — Memorandum from Assistant Solicitor, Fish and Wildlife, to Associate Director, Federal Assistance, FWS, re inclusion of "candidate species" in lists of species requested by federal agencies.

Exemption (b)(5) applies; this document is protected by the attorney-client privilege.

May 6, 1981 — Memorandum from Assistant Solicitor, Fish and Wildlife, to Associate Director, Federal Assistance, FWS, re consultation responsibilities on artificial habitats.

Exemption (b)(5) applies; this document is protected by the attorney-client privilege.

June 24, 1981 — Memorandum from Assistant Solicitor, Fish and Wildlife, to Associate Director, Federal Assistance, FWS, re the incidental taking of sea turtles.

Exemption (b)(5) applies; this document is protected by the attorney-client privilege.

July 15, 1981 — Memorandum from D. Cannon, Fish and Wildlife Branch, to Associate Director, Federal Assistance, FWS, re response to ICAC's concerns on permit for United Peregrine Society.

Exemption (b)(5) applies; this document is protected by the attorney-client and attorney work product privileges.

Sept. 9, 1981 — Memorandum from Associate Solicitor to Assistant Secretary, Fish and Wildlife and Parks, re falcon exports to Arabian Gulf.

Exemptions (b)(5) and (b)(6) apply. This document is protected by the attorney-client and deliberative process privileges. The document also contains references to a private individual for which disclosure would involve a clearly unwarranted invasion of personal privacy.

Oct. 2, 1981 — Note from Associate Solicitor to Solicitor, re status of Montana cooperative agreement.

Exemption (b)(5) applies to this note because it contains legal analysis provided by the Division of Conservation and Wildlife to the Solicitor; this document is protected by the attorney-client and deliberative process privileges.

Oct. 23, 1981 — Memorandum from Associate Solicitor to Associate Director, Federal Assistance, FWS,

re applicability of Section 7 to EPA/NPDES program.

Exemption (b)(5) applies; this document is protected by the attorney-client privilege.

Oct. 27, 1981 — Memorandum from Associate Solicitor to Regional Solicitor (Denver), re Section 7 and the use of surface occupancy stipulations in oil and gas leasing.

Exemption (b)(5) applies; this document is protected by the attorney-client privilege.

Dec. 2, 1981 — Memorandum from Assistant Solicitor, Fish and Wildlife, to Associate Director, Federal Assistance, FWS, re § 7 consultation on the Miralani Business Park.

Exemption (b)(5) applies; this document is protected by the attorney-client and deliberative process privileges.

Dec. 16, 1981 — Memorandum from Associate Solicitor to Assistant Regional Solicitor, Surface Mining (Denver), re applicability of ESA § 7 consultation requirement to the Office of Surface Mining (with enclosure).

Exemption (b)(5) applies; this document is protected by the attorney-client privilege.

Dec. 16, 1981 — Memorandum from Assistant Solicitor, Fish and Wildlife, to Director, FWS, re Crystal River research management plan.

Exemption (b)(5) applies; this document is protected by the attorney-client and deliberative process privileges.

January 1982 — Memorandum from Associate Solicitor to Solicitor, Assistant Secretary for Fish and Wildlife and Parks, and Director, FWS, re district court decision in Colorado River Water Conservation District v. Andrus.

Exemption (b)(5) applies; this memorandum is protected by the attorney-client and attorney work product privileges.

Jan. 12, 1982 — Memorandum from Assistant Solicitor, Fish and Wildlife, to Associate Director, Federal

Assistance, FWS, re eligibility of Oregon for a cooperative agreement for fish and wildlife.

Exemption (b)(5) applies; this document is protected by the attorney-client and deliberative process privileges.

Mar. 8, 1982 — Memorandum from Associate Solicitor, through Associate Solicitor, General Law, to Director, FWS, re criteria for Determinations of Effects under E.O. 12291 and the Regulatory Flexibility Act for rulemakings under Section 4 of the ESA.

Exemption (b)(5) applies; this document is protected by the attorney-client privilege.

Mar. 11, 1982 — Memorandum from Associate Solicitor to Associate Director, Federal Assistance, FWS, re Determinations of Effect for ESA listings.

Exemption (b)(5) applies; this document is protected by the attorney-client and deliberative process privileges.

Mar. 19, 1982 — Memorandum from Assistant Solicitor, Fish and Wildlife, to Director, FWS, re the relationship of the Raptor Amendment of the ESA to CITES.

Exemption (b)(5) applies; this document is protected by the attorney-client privilege.

May 19, 1982 — Memorandum from Associate Solicitor to Regional Solicitor (Denver), re continuation of Montana's eligibility for cooperative agreement under the ESA.

Exemption (b)(5) applies; this document is protected by the attorney-client and deliberative process privileges.

July 6, 1982 — Memorandum from Associate Solicitor to Regional Solicitor (Denver), re the Section 7 consultation process and cumulative effects.

Exemption (b)(5) applies; this document is protected by the attorney-client privilege.

Nov. 12, 1982 — Memorandum from Associate Solicitor to Director, FWS, re qualification of

		Smithsonian Institution to salvage dead specimens under the Endangered Species Act.
		Exemption (b)(5) applies; this document is protected by the attorney-client privilege.
Mar. 10, 1983		Note from Associate Solicitor to Special Assistant to the Solicitor, re proposed Corps of Engineers' "statewide" general "dredge and fill" permit for Maine and ESA requirements (with attachments).
		Exemption (b)(5) applies because this document contains legal analysis provided by the Division of Conservation and Wildlife to the Immediate Office of the Solicitor; it is protected by the attorney-client and deliberative process privileges.
Mar. 11, 1983		Memorandum from Assistant Solicitor, Fish and Wildlife, to Associate Director, Federal Assistance, FWS, re applicability of § 10(j) of the ESA to experimental populations of plants/invertebrates; current versus historic range; alternative authority for translocation.
		Exemption (b)(5) applies; this document is protected by the attorney-client privilege.
May 3, 1983		Memorandum from Associate Solicitor to Director, FWS, re timing of consultations required by the ESA, FWCA, CWA and MOA between Departments of Interior and the Army.
		Exemption (b)(5) applies; this document is protected by the attorney-client privilege.
June 29, 1983		Memorandum from Associate Solicitor to Director, FWS, re advice on Sec. 7 consultation procedures to be followed while proposed rule changes are pending.
		Exemption (b)(5) applies; this document is protected by the attorney-client and deliberative process privileges.
July 13, 1983		Memorandum from Assistant Solicitor, Fish and Wildlife, to Deputy Associate Director, Federal Assistance, FWS, re clarification of § 9(a)(2)(B) of the ESA, as amended in 1982.

Exemption (b)(5) applies; this document is protected by the attorney-client privilege.

Aug. 18, 1983 — Memorandum from Assistant Solicitor, Fish and Wildlife, to Associate Director, Federal Assistance, FWS, re eligibility of Vermont for a full authorities cooperative agreement.

Exemption (b)(5) applies; this document is protected by the attorney-client and deliberative process privileges.

Sept. 7, 1983 — Memorandum from Associate Solicitor to Director, FWS, re ESA conservation obligations of Federal Agencies; analysis of § 7(a)(1).

Exemption (b)(5) applies; this document is protected by the attorney-client, attorney work product, and deliberative process privileges.

Sept. 27, 1983 — Memorandum from Assistant Solicitor, Fish and Wildlife, to Associate Director, Federal Assistance, FWS, re eligibility of Vermont for cooperative agreement.

Exemption (b)(5) applies; this document is protected by the attorney-client and deliberative process privileges.

Nov. 22, 1983 — Letter from Associate Solicitor to Acting Assistant Attorney General, Land and Natural Resources Division, re litigation report for Friends of Endangered Species v. Jantzen.

Exemption (b)(5) applies; this letter is protected by the attorney-client and attorney work product privileges.

Dec. 29, 1983 — Memorandum from Assistant Solicitor, Fish and Wildlife, to Chief, Office of Endangered Species, re applicability of § 7(a)(2) to proposed and candidate species.

Exemption (b)(5) applies; this document is protected by the attorney-client privilege.

Jan. 31, 1984 — Memorandum from Assistant Solicitor, Fish and Wildlife, to Associate Director, Federal Assistance, FWS, re eligibility of Oklahoma for fish and wildlife cooperative agreement.

Exemption (b)(5) applies; this document is protected by the attorney-client and deliberative process privileges.

Feb. 6, 1984 — Memorandum from Assistant Solicitor, Fish and Wildlife, to Associate Director, Federal Assistance, FWS, re Indiana cooperative agreement submission.

Exemption (b)(5) applies; this document is protected by the attorney-client and deliberative process privileges.

Feb. 29, 1984 — Memorandum from Assistant Solicitor, Fish and Wildlife, to Associate Director, Federal Assistance, FWS, re threatened species special rules, law enforcement, and eligibility of Montana for a full authorities cooperative agreement covering the grizzly bear.

Exemption (b)(5) applies; this document is protected by the attorney-client and deliberative process privileges.

May 23, 1984 — Memorandum from Assistant Solicitor, Fish and Wildlife, to Associate Director, Federal Assistance, FWS, re Section 10(j) of the ESA and memoranda of understanding with Federal land managing agencies.

Exemption (b)(5) applies; this document is protected by the attorney-client privilege.

June 21, 1984 — Memorandum from Associate Solicitor to Office of Policy Analysis, DOI, re draft final procedural rules for the Endangered Species Committee.

Exemption (b)(5) applies; this memorandum contains legal analysis and recommendations that are protected by the attorney-client and deliberative process privileges.

July 20, 1984 — Memorandum from Assistant Solicitor, Fish and Wildlife, to Associate Director, Federal Assistance, FWS, re Oklahoma's eligibility for a full authorities cooperative agreement for fish and wildlife.

Exemption (b)(5) applies; this document is protected by the attorney-client and deliberative process privileges.

Aug. 21, 1984 — Memorandum from Associate Solicitor to Legislative Counsel, re H.R. 5900 (Private Wetland and Critical Habitat Enhancement and Protection; Public Lands Acquisition Alternatives).

Exemption (b)(5) applies because the above-described memorandum contains legal advice and recommendations provided to an Interior Department official, which is protected by the attorney-client and deliberative process privileges.

Aug. 24, 1984 — Memorandum from Assistant Solicitor, Fish and Wildlife, to Associate Director, Federal Assistance, FWS, re Mississippi's eligibility for a full authorities cooperative agreement for fish and wildlife.

Exemption (b)(5) applies; this document is protected by the attorney-client and deliberative process privileges.

Aug. 28, 1984 — Memorandum from Assistant Solicitor, Fish and Wildlife, to Associate Director, Federal Assistance, FWS, re Puerto Rico's eligibility for a full authorities cooperative agreement for fish, wildlife and plants.

Exemption (b)(5) applies; this document is protected by the attorney-client and deliberative process privileges.

Oct. 11, 1984 — Memorandum from Associate Solicitor to Chief, Office of Endangered Species, FWS, re Laguna Madre transmission line § 7 consultation; review of OES guidance on incidental takings (with attachments).

Exemption (b)(5) applies; this document is protected by the attorney-client privilege.

Jan. 28, 1985 — Letter from Acting Associate Solicitor to Assistant Attorney General, Land and Natural Resources Division, re notice of intent to sue filed by Friends of the Everglades with respect to the North Key Largo habitat conservation plan.

Exemption (b)(5) applies; this letter is protected by the attorney-client and attorney work product privileges.

Feb. 27, 1985 — Memorandum from Associate Solicitor to Associate Director, Federal Assistance, FWS, re regulated take of threatened species for conservation purposes.

Exemption (b)(5) applies; this document is protected by the attorney-client and deliberative process privileges.

Feb. 27, 1985 — Memorandum from Associate Solicitor to Sea Otter Recovery Coordinator, FWS, re preliminary draft environmental impact statement on the proposed translocation of Southern Sea Otters.

Exemption (b)(5) applies because the above-described memorandum contains legal advice and recommendations provided to an FWS official, which is protected by the attorney-client and deliberative process privileges.

Apr. 15, 1985 — Letter from Associate Solicitor to Assistant Attorney General, Land and Natural Resources Division, re litigation report for National Wildlife Federation v. Hodel (Steel-shot case).

Exemption (b)(5) applies; this letter is protected by the attorney-client and attorney work product privileges.

May 15, 1985 — Memorandum from Assistant Solicitor, Fish and Wildlife, to Associate Director, Federal Assistance, FWS, re Arizona's eligibility for a cooperative agreement for fish and wildlife.

Exemption (b)(5) applies; this document is protected by the attorney-client and deliberative process privileges.

May 30, 1985 — Memorandum from Associate Solicitor to Solicitor, Assistant Secretary for Fish and Wildlife and Parks, and Director, FWS, re San Bruno incidental take permit litigation.

Exemption (b)(5) applies because the above-described memorandum contains legal analysis

and advice provided to Interior Department officials, which is protected by the attorney-client and attorney work product privileges.

Sept. 11, 1985 — Memorandum from Assistant Solicitor, Fish and Wildlife, to Regional Director, Region 2, FWS, re Arizona's eligibility for a cooperative agreement for fish and wildlife.

Exemption (b)(5) applies; this document is protected by the attorney-client and deliberative process privileges.

Sept. 11, 1985 — Memorandum from Assistant Solicitor, Fish and Wildlife, to Regional Director (AFA), Region 5, FWS, re proposed amendment to current Vermont endangered species law.

Exemption (b)(5) applies; this document is protected by the attorney-client and deliberative process privileges.

Oct. 15, 1985 — Memorandum from Assistant Solicitor, Fish and Wildlife, to Associate Director, Federal Assistance, FWS, re eligibility of Oklahoma for a full authorities § 6 cooperative agreement for fish and wildlife.

Exemption (b)(5) applies; this document is protected by the attorney-client and deliberative process privileges.

Oct. 23, 1985 — Memorandum from Assistant Solicitor, Fish and Wildlife. to Chief, Office of Legislative Services, FWS, re effect of lapse of authorization for appropriations under ESA.

Exemption (b)(5) applies; this document is protected by the attorney-client privilege.

Nov. 6, 1985 — Memorandum from Assistant Solicitor, Fish and Wildlife, to Associate Director, Federal Assistance, FWS, re Iowa's eligibility for a full authorities cooperative agreement for plants.

Exemption (b)(5) applies; this document is protected by the attorney-client and deliberative process privileges.

Dec. 5, 1985 — Memorandum from Assistant Solicitor, Fish and Wildlife, to Associate Director, Federal Assistance, FWS, re Ohio's eligibility for a full authorities cooperative agreement for fish and wildlife.

Exemption (b)(5) applies; this document is protected by the attorney-client and deliberative process privileges.

Dec. 17, 1985 — Memorandum from Assistant Solicitor, Fish and Wildlife, to Associate Director, Federal Assistance, FWS, re Indiana's eligibility for a cooperative agreement for fish and wildlife.

Exemption (b)(5) applies; this document is protected by the attorney-client and deliberative process privileges.

Feb. 3, 1986 — Memorandum from Associate Solicitors for Conservation and Wildlife, Energy and Resources, and Indian Affairs, to Solicitor, re Pyramid Lake litigation issues.

Exemption (b)(5) applies because the above-described memorandum contains legal analysis and recommendations provided by three Associate Solicitors to the Solicitor on then-pending litigation; the document is protected by the attorney-client, attorney work product, and deliberative process exemptions.

Apr. 2, 1986 — Memorandum from D. Gayer, Branch of Fish and Wildlife, to S. Allender, Acting Assistant Solicitor, and G. Norton, Associate Solicitor, re litigation on San Bruno Habitat Conservation Plan.

Exemption (b)(5) applies because the above-described memorandum contains legal analysis and recommendations provided by a staff attorney to his supervisors within the Division of Conservation and Wildlife; the document is protected by the attorney-client, attorney work product, and deliberative process privileges.

Apr. 28, 1986 — Memorandum from Associate Solicitor to Special Assistant to the Solicitor, re extraterritorial applicability of ESA and

protections afforded exotic endangered or threatened species (with attachments).

Exemption (b)(5) applies because the above-described memorandum contains legal analysis provided by the Division of Conservation and Wildlife to the Immediate Office of the Solicitor; the document is protected by the attorney-client and deliberative process privileges.

Apr. 30, 1986 — Memorandum from Associate Solicitor to Acting Associate Solicitor, Energy and Resources, re protection of special status plant species on BLM lands.

Exemption (b)(5) applies because the above-described memorandum contains legal analysis and recommendations on a then-pending agency proposal; it is protected by the attorney-client and deliberative process privileges.

May 27, 1986 — Memorandum from Acting Assistant Solicitor, Fish and Wildlife, to Associate Director, Federal Assistance, FWS, re Kentucky's eligibility for a fish and wildlife cooperative agreement.

Exemption (b)(5) applies; this document is protected by the attorney-client and deliberative process privileges.

July 2, 1986 — Memorandum from Assistant Solicitor, Fish and Wildlife, to Reviewers, re review of DEIS for sea otter translocation proposal.

Exemption (b)(5) applies because the above-described memorandum contains legal analysis and recommendations provided to Interior Department decision makers on a then-pending agency proposal; the document is protected by the attorney-client and deliberative process privileges.

July 11, 1986 — Memorandum from Assistant Solicitor, Fish and Wildlife, to Director, FWS, re eligibility of Montana for ESA § 6 funding for grizzly bear activities.

Exemption (b)(5) applies; this document is protected by the attorney-client and deliberative process privileges.

Sept. 9, 1986 — Memorandum from Assistant Solicitor, Fish and Wildlife, to Director, FWS, re A. Regina ferry on Mona Island.

Exemption (b)(5) applies because the above-described memorandum contains legal analysis and recommendations provided to the FWS regarding potential litigation; the document is protected by the attorney-client and attorney work product privileges.

Sept. 19, 1986 — Briefing memorandum from Associate Solicitor to Solicitor, re Defenders of Wildlife v. Hodel (§ 7 extraterritoriality case) (with attachment).

Exemption (b)(5) applies because the above-described memorandum contains legal analysis and recommendations provided by the Division of Conservation and Wildlife to the Solicitor regarding pending litigation; the document is protected by the attorney-client, attorney work product, and deliberative process privileges.

Oct. 1, 1986 — Memorandum from Assistant Solicitor, Fish and Wildlife, to Assistant Director, Fish and Wildlife Enhancement, FWS, re draft final rule to list the Little Colorado Spinedace as a threatened species and to designate its critical habitat.

Exemption (b)(5) applies because the above-described memorandum contains legal analysis and recommendations provided to the FWS concerning a then-pending agency proposal; the document is protected by the attorney-client and deliberative process privileges.

Oct. 9, 1986 — Memorandum from Associate Solicitors for Conservation and Wildlife and Energy and Resources to Directors of FWS and MMS, re request for review of biological opinion concerning hypothetical areawide offshore oil and gas development and production in the Northern Santa Maria Basin, San Luis Obispo County, California.

Exemption (b)(5) applies because the above-described memorandum contains legal analysis and recommendations provided to Interior

Department officials concerning a then-pending agency proposal; the document is protected by the attorney-client and deliberative process privileges.

Nov. 14, 1986 — Memorandum from Assistant Solicitor, Fish and Wildlife, to Assistant Director, Fish and Wildlife Enhancement, FWS, re availability of permits for the importation of dead endangered species specimens to be used for public display purposes.

Exemption (b)(5) applies; this document is protected by the attorney-client privilege.

Nov. 19, 1986 — Letter from Associate Solicitor to Assistant Attorney General, Division of Land and Natural Resources, re litigation report for Sierra Club v. Marsh, Case No. '861942 S(IEG) (S.D. Cal., filed Sept. 17, 1986).

Exemption (b)(5) applies; this letter is protected by the attorney-client and attorney work product privileges.

Dec. 9, 1986 — Letter from Associate Solicitor to Assistant Attorney General, Land and Natural Resources Division, re litigation report for Defenders of Wildlife v. Hodel (§ 7 extraterritoriality case).

Exemption (b)(5) applies; this letter is protected by the attorney-client and attorney work product privileges.

Jan. 14, 1987 — Letter from Associate Solicitor to Assistant Attorney General, Division of Land and Natural Resources, re legal concerns with respect to the district court decision in Palila v. Hawaii Department of Land and Natural Resources, Civ. No. 78-0030 (D. Hawaii, Nov. 21, 1986).

Exemption (b)(5) applies; this letter is protected by the attorney-client and attorney work product privileges.

Feb. 27, 1987 — Memorandum from Associate Solicitor to Legislative Counsel, re H.R. 779 (kangaroo imports).

Exemption (b)(5) applies because the above-described memorandum contains legal analysis provided to an Interior Department official; this document is protected by the attorney-client privilege.

Mar. 10, 1987 — Memorandum from Assistant Solicitor, Fish and Wildlife, to Director, FWS, re availability of permits to take depredating endangered gray wolves.

Exemption (b)(5) applies; this document is protected by the attorney-client privilege.

Mar. 24, 1987 — Memorandum from Assistant Solicitor, Fish and Wildlife, to Director, FWS, re review of Sea Otter Translocation FEIS, final rule, and revised Determination of Effects.

Exemption (b)(5) applies because the above-described memorandum contains legal advice and recommendations provided to the FWS on a then-pending agency proposal; the document is protected by the attorney-client and deliberative process privileges.

May 5, 1987 — Memorandum from Associate Solicitor to Director, BLM, re BLM responsibilities under the ESA.

Exemption (b)(5) applies because the above-described memorandum contains legal advice provided to an Interior Department official; the document is protected by the attorney-client privilege.

June 15, 1987 — Memorandum from Assistant Solicitor, Fish and Wildlife, to Director, FWS, re Solicitor's Office recommendations on draft final rule to list the Bay Checkerspot Butterfly.

Exemption (b)(5) applies because the above-described memorandum contains legal analysis, advice, and recommendations provided to the FWS regarding a then-pending agency proposal; the document is protected by the attorney-client and deliberative process privileges.

July 23, 1987 — Memorandum from Acting Assistant Solicitor, Fish and Wildlife, to Director, FWS, re Solicitor's Office recommendations on draft proposed rule to list the Stephens' kangaroo

rat under § 4 of the ESA.

Exemption (b)(5) applies because the above-described memorandum contains legal analysis, advice, and recommendations provided to the FWS regarding a then-pending agency proposal; the document is protected by the attorney-client and deliberative process privileges.

Mar. 11, 1988 — Memorandum from Assistant Solicitor, Fish and Wildlife, to Assistant Director, Fish and Wildlife Enhancement, FWS, re Solicitor's Office recommendations on draft proposed rule to list the Roanoke logperch under § 4 of the ESA.

Exemption (b)(5) applies because the above-described memorandum contains legal analysis, advice, and recommendations provided to the FWS regarding a then-pending agency proposal; the document is protected by the attorney-client and deliberative process privileges.

Aug. 4, 1988 — Memorandum from Acting Assistant Solicitor, Fish and Wildlife, to Director, FWS, re draft proposed rule on technical amendments to the Southern Sea Otter translocation regulations.

Exemption (b)(5) applies because the above-described memorandum contains legal advice and recommendations provided to the FWS regarding a then-pending agency proposal; the document is protected by the attorney-client and deliberative process privileges.

Aug. 23, 1988 — Memorandum from Assistant Solicitor, Fish and Wildlife, to Director, FWS, re request for review and approval of Oregon's revised authorities for managing endangered plants.

Exemption (b)(5) applies; this document is protected by the attorney-client and deliberative process privileges.

Oct. 19, 1988 — Memorandum from Assistant Solicitor, Fish and Wildlife, to Regional Solicitor (Portland), re review of the FWS draft proposed rule to determine experimental population status for an introduced population of Lahontan Cutthroat Trout.

Exemption (b)(5) applies because the above-described memorandum contains legal advice and recommendations provided to the FWS regarding a pending agency proposal; the document is protected by the attorney-client and deliberative process privileges.

Oct. 26, 1988 — Memorandum from Assistant Solicitor, Fish and Wildlife, to Assistant Director, Fish and Wildlife Enhancement, FWS, re Solicitor's Office recommendations on draft document addressing experimental population status for a new population of Colorado squawfish.

Exemption (b)(5) applies because the above-described memorandum contains legal advice and recommendations provided to the FWS regarding a pending agency proposal; the document is protected by the attorney-client and deliberative process privileges.

Nov. 8, 1988 — Memorandum from Assistant Solicitor, Fish and Wildlife, to Assistant Director, Fish and Wildlife Enhancement, FWS, re Solicitor's Office recommendations concerning draft proposed rule to authorize the release of an experimental population of Guam rails.

Exemption (b)(5) applies because the above-described memorandum contains legal advice and recommendations provided to the FWS regarding a then-pending agency proposal; the document is protected by the attorney-client and deliberative process privileges.

Jan. 24, 1989 — Letter from Associate Solicitor to Acting Assistant Attorney General, Division of Land and Natural Resources, re litigation report for Natural Resources Defense Council v. Houston.

Exemption (b)(5) applies; this letter is protected by the attorney-client and attorney work product privileges.

Apr. 21, 1989 — Memorandum from Associate Solicitor to Acting Legislative Counsel, re H.R. 1268 (National Biological Diversity Conservation and Environmental Research Act).

Exemption (b)(5) applies because the above-described memorandum contains legal analysis

and recommendations provided to an Interior Department official; the document is protected by the attorney-client privilege.

Apr. 21, 1989 — Memorandum from Associate Solicitor to Acting Legislative Counsel, re State Department's draft comments on the amendments to the Foreign Assistance Act.

Exemption (b)(5) applies because the above-described memorandum contains legal analysis and recommendations provided to an Interior Department official; the document is protected by the attorney-client privilege.

Oct. 20, 1989 — Memorandum from Associate Solicitor to Associate Solicitor, Energy and Resources, re answers to legal questions in the Friant Unit litigation.

Exemption (b)(5) applies because the above-described memorandum contains legal analysis and advice regarding issues involved in pending litigation; the document is protected by the attorney-client and attorney work product privileges.

Oct. 23, 1989 — Memorandum from Assistant Solicitor, Fish and Wildlife, to Director, FWS, re Allied-Signal v. Lujan (ESA §§ 7 & 9 and CERCLA issues).

Exemption (b)(5) applies because the above-described memorandum contains legal analysis, advice, and recommendations provided to the FWS; the document is protected by the attorney-client and attorney work product privileges.

Oct. 26, 1989 — Memorandum from Assistant Solicitor, Fish and Wildlife, to Director, FWS, re Apex land transfer and ESA requirements.

Exemption (b)(5) applies; this document is protected by the attorney-client and deliberative process privileges.

Dec. 22, 1989 — Memorandum from Associate Solicitor to Deputy Solicitor, re endangered species consultation procedures for relicensing of FERC Projects Nos. 1417 and 1835, Platte River, Nebraska.

Exemption (b)(5) applies because the above-described memorandum contains legal analysis and recommendations provided by the Division of Conservation and Wildlife to the Deputy Solicitor; the document is protected by the attorney-client and deliberative process privileges.

Jan. 16, 1990 — Memorandum from Assistant Solicitor, Fish and Wildlife, to Assistant Director, Fish and Wildlife Enhancement, FWS, re Solicitor's Office recommendations on draft proposed rule to list the prairie mole cricket under § 4 of the ESA.

Exemption (b)(5) applies because the above-described memorandum contains legal analysis and recommendations provided to the FWS on a pending agency proposal; the document is protected by the attorney-client and deliberative process privileges.

Jan. 16, 1990 — Memorandum from Associate Solicitor to Legislative Counsel, re comments on H.R. 3753 (a bill to amend §§ 4 and 7 of the ESA).

Exemption (b)(5) applies because the above-described memorandum contains legal analysis and advice provided to an Interior Department official; the document is protected by the attorney-client privilege.

Jan. 16, 1990 — Memorandum from Associate Solicitor to Legislative Counsel, re S. 1554 (Truckee-Carson-Pyramid Lake Water Rights Settlement Act).

Exemption (b)(5) applies because the above-described memorandum contains legal analysis and advice provided to an Interior Department official; the document is protected by the attorney-client privilege.

Feb. 15, 1990 — Memorandum from Associate Solicitor to Director, FWS, re Bureau of Reclamation request for formal consultation on the San Joaquin River Basin Resource Management Initiative (without attachments).

Exemption (b)(5) applies because the above-described memorandum contains legal advice provided to the FWS regarding administrative matters in pending litigation; the document

is protected by the attorney-client and attorney work product privileges.

Mar. 23, 1990 — Memorandum from Associate Solicitor to Legislative Counsel, re H.R. 3941 (Truckee-Carson-Pyramid Lake Water Rights Settlement Act).

Exemption (b)(5) applies because the above-described memorandum contains legal analysis and advice provided to an Interior Department official; the document is protected by the attorney-client privilege.

Mar. 26, 1990 — Memorandum from Associate Solicitor, through Acting Deputy Solicitor, to Chief of Staff, re settlement of Sierra Club's threatened legal challenge under the ESA to Kerr-McGee Chemical Corporation's Apex facility in Clark County, Nevada.

Exemption (b)(5) applies because the above-described memorandum contains legal analysis provided to the Office of the Secretary in the context of threatened litigation; the document is protected by the attorney-client and attorney work product privileges.

May 9, 1990 — Memorandum from Associate Solicitors for Conservation and Wildlife and Energy and Resources to Legislative Counsel, re H.R. 4700 (California Fish and Wildlife Protection Act of 1990).

Exemption (b)(5) applies because the above-described memorandum contains legal analysis and recommendations provided to an Interior Department official; the document is protected by the attorney-client and deliberative process privileges.

May 9, 1990 — Letter from Associate Solicitor to General Counsel, Department of Agriculture, re exemption process under § 7.

Exemption (b)(5) applies because the above-described letter contains legal analysis and advice provided to another executive branch agency, which is protected by the attorney-client and deliberative process privileges.

July 1990 — Note from Acting Associate Solicitor to Solicitor, re San Juan River issues (with

attachments).

Exemption (b)(5) applies because the above-described note contains legal analysis and recommendations provided by the Division of Conservation and Wildlife to the Solicitor; the document is protected by the attorney-client and deliberative process privileges.

July 5, 1990 — Memorandum from Assistant Solicitor, Fish and Wildlife, to Deputy Director, FWS, re petition to intervene in the Kingsley Dam Projects (with attachment).

Exemption (b)(5) applies because the above-described memorandum and attachment contain legal analysis and advice provided to the FWS; the document is protected by the attorney-client privilege.

July 20, 1990 — Memorandum from Acting Associate Solicitor to Legislative Counsel, re S. 1554 (Truckee-Carson-Pyramid Lake Water Rights Settlement Act); review of Administration draft proposal.

Exemption (b)(5) applies because the above-described memorandum contains legal analysis and advice provided to an Interior Department official; the document is protected by the attorney-client privilege.

July 30, 1990 — Memorandum from Acting Associate Solicitor, Conservation and Wildlife, and Associate Solicitors for Energy and Resources and Indian Affairs, to Solicitor, re S. 1554 (Truckee-Carson-Pyramid Lake Water Rights Settlement Act); review of Administration draft proposal.

Exemption (b)(5) applies because the above-described memorandum contains legal analysis and recommendations provided by three Divisions of the Solicitor's Office to the Solicitor; the document is protected by the attorney-client and deliberative process privileges.

Sept. 7, 1990 — Memorandum from Acting Assistant Solicitor, Fish and Wildlife, to Legislative Counsel, re comments on H.R. 3960 (Central Utah Project Completion Act, etc.).

Exemption (b)(5) applies because the above-described memorandum contains legal analysis and advice provided to an Interior Department official; the document is protected by the attorney-client privilege.

Sept. 14, 1990 — Memorandum from Assistant Solicitor, Fish and Wildlife, through Acting Associate Solicitor, to Solicitor, re Animas-La Plata Project and ESA issues.

Exemption (b)(5) applies because the above-described memorandum contains legal analysis and recommendations provided by the Division of Conservation and Wildlife to the Solicitor; the document is protected by the attorney-client and deliberative process privileges.

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UNITED STATES
DEPARTMENT OF THE INTERIOR
OFFICE OF THE SOLICITOR
WASHINGTON, D.C. 20240

APR 17 1981

Memorandum

To: Director, Fish and Wildlife Service

From: Associate Solicitor, Conservation and Wildlife

Subject: Fish and Wildlife Service Regulations Defining "Harm" under Section 9 of the Endangered Species Act

This memorandum examines the statutory authority underlying the definition of "harm" contained in FWS regulations implementing Section 9 of the Endangered Species Act, 16 U.S.C. 1538. We conclude that the present definition exceeds the scope of authority conferred by Section 9. We recommend that the Service's definition of "harm" be clarified so that only those habitat modifications that actually injure or kill wildlife are subject to Section 9 criminal penalties.

Discussion

Section 9 of the Endangered Species Act (ESA), 16 U.S.C. 1538, makes it illegal to "take" an endangered species of fish or wildlife. That term is defined as follows:

> The term "take" means to harass, harm, pursue, hunt, shoot, wound, kill, trap, capture or collect, or to attempt to engage in any such conduct.

16 U.S.C. 1532(19). Fish and Wildlife Service Regulations define "harm" as follows:

> "Harm" in the definition of "take" in the Act means an act or omission which actually injures or kills wildlife, including acts which annoy it to such an extent as to significantly disrupt essential behavioral patterns, which include, but are not limited to, breeding, feeding or sheltering; significant environmental modification or degradation which has such effects is included within the meaning of "harm."

50 C.F.R. 17.3 (emphasis added).

This definition contains a significant ambiguity. If the words "such effects" are read to refer to the phrase "significantly disrupt essential behavorial patterns," then any significant environmental modification or degradation that disrupts essential behavioral patterns will fall under the definition of harm, regardless of whether an actual killing or injuring of wildlife is demonstrated. Under such an interpretation a showing of habitat modification alone would be sufficient to invoke the criminal penalties of Section 9. As discussed below, such a result is inconsistent with the intent of Congress. 1/

A. The Endangered Species Act

ESA concerns itself with two major causes of species decline: (1) the commercial and sport taking of individual animals, and (2) the destruction or degradation of species' habitats. The Act creates a bifurcated system for dealing with these distinct problems. Section 7, 16 U.S.C. 1536, requires federal agencies to insure that actions taken are not likely "to jeopardize the continued existence of any endangered species or threatened species or result in the destruction or adverse modification of habitat of such species ..." Further, Section 5 authorizes land acquisitions as an additional means for preserving the habitat of listed species. 16 U.S.C. § 1534. Together, these two sections were designed to address the threatened destruction of habitat for listed species. Section 9, on the other hand, prohibits all actions that constitute an actual taking of an endangered species of fish or wildlife. 16 U.S.C. 1538.

1/ Each of the four published articles that has considered the subject concludes that the Service's definition is overbroad. Bean, The Evolution of National Wildlife Law 395-97 (1977); Note, Endangered Species Act: Constitutional Tension and Regulatory Discord, 4 Colum. J. Envt'l L. 97, 100 n. 19 (1977); Note, Endangered Species Act of 1973: Preservation or Pandemonium? 5 Envt'l L. 29, 38--47 (1974); Note, Obligations of Federal Agencies Under Section 7 of the Endangered Species Act of 1973, 28 Stan. L. Rev. 1247, 1251 n. 36 (1976).

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The Act's definition of "take" contains a list of actions that illustrate the intended scope of the term: harass, harm, pursue, hunt, shoot, wound, kill, trap, capture, or collect or attempts to engage in any such conduct. With the possible exception of "harm," these terms all represent forms of conduct that are directed against and likely to injure or kill individual wildlife. Under the principle of statutory construction, ejusdem generis, where general words accompany words of specific meaning, such general words are construed as applying only to actions of the same class as those specifically mentioned. Goldsmith v. U.S., 42 F.2d 133 (2d Cir. 1948). Applying this principle to the present construction problem, the term "harm" should be interpreted to include only those actions that are directed against, and likely to injure or kill, individual wildlife.

Also applicable here is the rule that provisions of a statute should not be construed in a manner that renders other provisions of the statute superfluous. If the Service's definition of "harm" is interpreted to prevent habitat modifications, without a further finding of actual injury to a listed species, Section 9 could be violated in most instances in which Section 7 consultation is called for. That is, it would be counterproductive for a federal agency to initiate Section 7 consultation over a proposed private action that would significantly modify a listed species habitat, if such private activity were already proscribed under Section 9. Such a construction would render Section 7 largely unnecessary. See Bean supra n. 1 at 397.

B. Legislative History

The legislative history reinforces the distinction between the taking prohibition of Section 9 and the habitat protection provisions of Section 7. Representative Sullivan, whose committee reported the House bill, stated:

> For the most part, the principal threat to animals stems from the destruction of their habitat. The destruction may be intentional, as would be the case in clearing of fields and forests for development of resource extraction, or it may be unintentional, as in the case of the spread of pesticides beyond their target area. Whether it is intentional or not, however, the

> result is unfortunate for the species of animals that depend on that habitat, most [of] whom are already living on the edge of survival. H.R. 37 will meet this problem by providing funds for acquisition of critical habitat. It will also enable the Department of Agriculture to cooperate with willing landowners who desire to assist in the protection of endangered species, but who are understandably unwilling to do so at excessive cost to themselves.
>
> Another hazard to endangered species arises from those who would capture or kill them, for pleasure or profit. There is no way that the Congress can make it less pleasurable for a person to take an animal, but we can certainly make it less profitable for them to do so. (emphasis added)

119 Cong. Rec. H8-18 (daily ed. Sept. 18, 1973).

The fact that Congress considered the problems of takings and habitat modifications separately does not, of course, preclude the possibility of overlap between the two regulatory schemes. Indeed, Congress seemed to anticipate such overlap when it made the following statement, taken from the House Report:

> "Take" is defined broadly. It includes harassment, whether intentional or not. This would allow, for example, the Secretary to regulate or prohibit the activities of bird-watchers where the effect of those activities might disturb the birds and make it difficult for them to hatch or raise their young. (emphasis added)

On its face this statement implies that an action such as habitat modifications which do not result in the actual injuring or killing of wildlife may nonetheless constitute a taking ("where the effects of these activities might disturb birds ..."). We think it noteworthy, however, that the statement is limited to acts of harassment. "Harass" is defined at 50 C.F.R. 17.3 as follows:

> "Harrass" in the definition of "take" in the Act means an intentional or negligent act or omission which creates the likelihood of injury to wildlife by annoying it to such an extent as to significantly disrupt normal behavioral patterns which include, but are not limited to, breeding, feeding or sheltering. (emphasis added)

Under this definition two elements must be shown before a finding of harassment can be made: (1) likelihood of injury to wildlife, and (2) some degree of fault, either intentional or negligent. Because the definition contains an element of fault, it will not result in criminal liability for habitat modifications unless it is shown that the defendant knew or reasonably should have known that his actions would be likely to injure wildlife. Thus a private landowner who wishes to develop land that serves as habitat for an endangered species may do so if reasonable measures are taken to avoid injury to wildlife. The same is not true, however, of the definition of "harm." That definition adopts a strict liability standard which would impose criminal penalties on habitat modifications generally regardless of fault. Thus under the definition of "harm" a private landowner may be criminally liable for significant habitat modifications regardless of the reasonableness of his efforts to mitigate harm to individual wildlife.

An early version of the bill that became ESA specifically included "destruction, modification, or curtailment of habitat or range" within the definition of "take" but this was deleted from the final act. S. 1983. 93d Cong., 1st Sess. § 3(6)(A)(1973). Such deletions generally militate against a conclusion that Congress intended a result that it expressly declined to enact. See Gulf Oil Corp. v Copp Paving Co., 419 U.S. 186 (1974). Accordingly, the Service's definition of "harm" should be clarified so that only those habitat modifications that result in the actual killing or injuring of wildlife will be subject to Section 9 criminal penalties.

D. Case Law

The limited case law interpreting the definition of "harm" indicates judicial confusion over the proper scope of the term. The Supreme Court mentioned the definition of "harm" in TVA v. Hill, 437 U.S. 153 (1978), but did not clarify its meaning. It said in regard to the Tellico Dam situation, "[w]e

do not understand how TVA intends to operate Tellico Dam without 'harming' the snail darter." 437 U.S. at 184 n. 30. We interpret the court's statement only to apply to the situation where an action would both degrade habitat and kill individual fish. 2/ Such an interpretation is consistent with the approach adopted in this memorandum.

Only two cases have thus far interpreted the concept of "harm". In Sierra Club v. Froehlke, 534 F.2d 1289 (8th Cir. 1976), the Sierra Club sought to enjoin construction of a proposed dam alleging, inter alia, a violation of Section 9 of the Endangered Species Act. In a brief discussion, of limited, if any, assistance on the habitat modification question, the court rejected plaintiffs' taking allegation, noting that a violation of Section 9 "rests upon the asserted ground that the erection of the dam is a 'clear attempt to harass or harm' the Indiana bat." 534 F.2d at 1304. The court's statement would seem to imply that a showing of specific intent to harass or harm is necessary to prove a taking, a position inconsistent with the strict liability prohibitions established by Sections 9 and 11 and the present regulatory definition. Significantly,

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2/ The Supreme Court in TVA v. Hill recited the findings of the district court that construction of Tellico Dam "would make it highly probable that snail darter eggs would smother . . ." and that "[the snail darter's] primary source of food, snails, would probably not survive." 437 U.S. at 165 N. 16. We assume that the Supreme Court expected the destruction of the species' primary food source to result in the killing of individual fish.

however, Froehlke was decided prior to promulgation of the "harm" definition, 44 Fed. Reg. 44415 (September 26, 1975), and the court therefore lacked the benefit of an agency interpretation. 3/

The second case interpreting the definition of "harm" is Palila v. Hawaii Department of Land and Natural Resources, 471 F. Supp. 985 (D. Haw. 1979), aff'd, No. 79-4636 (9th Cir. Feb. 9, 1981). This case did, on its face, direct its attention to habitat modification. In Palila, Section 9 was invoked by the Sierra Club to prevent the State of Hawaii's wildlife agency from allowing feral goats and sheep to roam in the critical habitat of the palila, an endangered bird species. The plaintiffs alleged that because the state had allowed the destruction of forest vegetation which provides the Palila's food, shelter and nest sites, a taking had occurred even though no killing or injuring of individual Palilas was demonstrated. The district court interpreted the Service's definition as follows:

> "Take" is defined in the Act to include "harm" which in turn is defined in regulations propounded by the Secretary of the Interior to include "significant environmental modification or degradation" which actually injures or kills wildlife. (emphasis added)

3/ The district court opinion in Froehlke was issued on March 19, 1975. The briefs in the court of appeals case were submitted to the court on September 10, 1975. Two weeks after the briefs were submitted to the court of appeals, the Fish and Wildlife Service issued its endangered species regulations defining the concept of harm. 44 Fed. Reg. 44415 (September 26, 1975).

471 F.Supp. at 995. 4/

In a brief opinion, the Ninth Circuit Court of Appeals affirmed the district court's decision in Palila. The court's discussion of the taking issue demonstrates fundamental confusion over the distinction between habitat modifications and takings. On the basis of the FWS definition of harm, the Ninth Circuit concluded that a taking had occurred. Slip op. at 287. The court's discussion of its finding strongly suggests that it confused the taking prohibition of Section 9 with the habitat modification provisions of Section 7. The court rested its conclusion on the fact that "it was shown that the Palila was endangered by the activity." Id. Citing TVA v. Hill, supra, the court noted its belief that its conclusion was consistent with the Act's legislative history which showed "that Congress was informed that the greatest threat to endangered species is the destruction of their natural habitat." Id.

4/ On its face this interpretation is in accord with the approach taken in this memorandum. The difficulty with Palila is that the standard was misapplied to the facts of the case. The district court, in a footnote, acknowledged that available estimates showed the Palila population to have actually increased since the onset of the state's grazing program, yet speculated that those estimates may have been "deceptively high" and went on to conclude that a taking had occurred. 471 F. Supp. at 988 n. 2. Accordingly, the district court's recital of the proper rule notwithstanding, Palila can be read as holding that habitat modification alone may constitute "harm." Furthermore, the issue of whether the Service's definition of "harm" exceeds statutory authority was neither briefed by the parties nor addressed by the court in Palila. Under the rule of Webster v. Fall, 266 U.S. 507, 511 (1925), questions not brought to a court's attention "are not to be considered as having been so decided as to constitute precedents".

As the result of the FWS overly broad definition of "harm", the Ninth Circuit decision in Palila erroneously supports the view that habitat modifications alone may constitute "harm." The implications of such a decision are far-reaching. The discussion set forth above indicates that the present definition of "harm," as interpreted by the Court of Appeals in Palila, exceeds the statutory authority conferred by Section 9 of the Act. Accordingly, we recommend that the Service clarify its definition to prevent the result reached in Palila.

Conclusion

In view of the foregoing discussion, we recommend that the Service's definition of "harm" at 50 C.F.R. 17.3 be modified to read as follows:

> "Harm" in the definition of "take" in the Act means an act or omission which actually injures or kills wildlife.

(signed)

J. Roy Spradley, Jr.

: Solicitor Docket
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United States Department of the Interior

OFFICE OF THE SOLICITOR

MAILING ADDRESS:
P. O. BOX 25007
DENVER FEDERAL CENTER
DENVER, CO 80225

June 9, 1981

Memorandum

To: Assistant Regional Director, FWS, Region 6, Denver (AFA)

From: Regional Solicitor, Rocky Mountain Region

Subject: HUD Delegation of Endangered Species Act Consultation Requirements

This is to explain the oral advice given to your Salt Lake City office regarding the effect of the Community Development Act of 1974, 42 U.S.C. 5302 et seq. on endangered species consultations. In this Act, Congress permitted the Secretary, Department of Housing and Urban Development (HUD), to release funds to applicants for community development facilities who assume all the responsibilities for environmental review under NEPA and under other environmental laws. The Secretary was to specify in regulations which environmental review responsibilities the applicants were to comply with in the same manner as if HUD were building the project. These environmental review and decisionmaking responsibilities which were to be delegated by regulation were to include responsibilities under NEPA and other provisions of law which further the purposes of NEPA. The implementation of the Endangered Species Act furthers the purposes of NEPA by aiding in the fulfillment of trustee responsibilities for the environment, by preserving important natural aspects of our heritage and by maintaining an environment which supports diversity, 16 U.S.C. 4331(b)(1), (4).

The Secretray was to consult with CEQ before issuing the regulations. The Secretary, before releasing funds, must approve the applicant's certification that it has carried out its responsibilities under the law listed in the regulations. Congress provided that such certification is deemed to satisfy HUD's responsibilities under these statutes. Therefore, Congress has established authority for HUD, by regulation, to delegate Section 7 responsibilities to an applicant.

In 24 C.F.R. 58.22(c), HUD has done just that. Its regulations state that the applicant shall consult with the Department of the Interior if the action may affect an endangered species.1/ However, HUD maintains a monitoring role in this process, remains accountable for its decisions, and when given notice of irregularities, has a responsibility to see that procedural requirements are met. Colony Federal Sav. and Loan Ass'n v. Harris, 282 F. Supp. 296 (W.D. Pa. 1980). In addition, as stated above, HUD must approve the applicant's certification that the Section 7 consultation procedures have been complied with before releasing funds; it remains ultimately responsible.

I advised the Salt Lake office Endangered Species personnel that consultation can take place with the applicants for community development funds instead of with HUD. The FWS regulations provide for non-Federal representatives to be authorized to participate in the consultation process pursuant to approved counterpart regulations but the ultimate responsibility for compliance with Section 7 procedures remains with the federal agency, 50 C.F.R. 402.04(d). This advice is consistent with the regulations. I advised that HUD should receive copies of all correspondence so it can effectively monitor the process. In the event the applicant does not do an adequate biological assessment or FWS does not agree with its conclusions, FWS should notify the applicant, with a copy to HUD. If the disagreement cannot be worked out, FWS should notify HUD of its views, with a copy sent to the applicant. Since HUD has to approve the applicant's certification, HUD legally remains the ultimate decisionmaker.

Margot Zallen

Margot Zallen
For the Regional Solicitor
Rocky Mountain Region

1/ It should state threatened or endangered species.

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OES

UNITED STATES
DEPARTMENT OF THE INTERIOR
OFFICE OF THE SOLICITOR
WASHINGTON, D.C. 20240

AUG 27 1981

Memorandum

To: Director, Fish and Wildlife Service

From: Associate Solicitor, Conservation and Wildlife

Subject: Cumulative Effects to be Considered Under Section 7 of the Endangered Species Act

This memorandum sets forth the legal requirements for consideration by federal agencies of the "cumulative effects" of other projects and impacts in determining whether a particular proposed action complies with section 7(a) of the Endangered Species Act (ESA or Act), 16 U.S.C. 1536(a). The Solicitor has now withdrawn all prior legal opinions 1/ on cumulative impacts and section 7. This memorandum shall control the scope of consultation and cumulative impact analysis under the Endangered Species Act.

Section 7 requires all federal agencies, in consultation with the Fish and Wildlife Service (FWS or Service), to insure that their actions are not likely to jeopardize the continued existence of endangered or threatened species, or adversely modify their critical habitats. The Service consults with federal agencies and renders a biological opinion on the effects of agency action upon listed species, pursuant to section 7(b), 16 USC 1536(b).

Consideration of the legal requirements for cumulative efferts analysis arose in 1978, as the result of section 7 consultations for two water development projects on the North and South Platte Rivers: the Grayrocks Dam and the Narrows Project. As proposed, both projects would affect downstream

1/ 85 Interior Dec. 275 (July 19, 1978) (supplemented July 24, 1978). An earlier Deputy Solicitor opinion issued on May 25, 1978, was withdrawn on June 5, 1978. (Copies attached).

flows in the Big Bend area of the Platte River in Nebraska, an area designated as critical habitat for the whooping crane. During these consultations, the Service requested a Solicitor's Opinion on whether section 7 requires consideration of the effects of other water projects in the area which were then in the planning or construction phases, would affect the crane's habitat, and would have impacts which might be cumulative to those of the proposal at hand.

An opinion issued on July 19, 1978, concluded that federal agencies must consider the cumulative effects of other projects, whether federal, state or private, during consultations under section 7. Although the July 19 opinion did not expressly define the term "cumulative effects", a July 24, 1978 opinion stated that for any ecosystem upon which an endangered or threatened species depends, all pending project impacts must be considered if those impacts can reasonably be anticipated to occur either before or after the completion of the project which is the subject of consultation.

For the reasons that follow, the definition of cumulative effects used in these prior opinions is inappropriate when applied to section 7.

Consideration of Cumulative Effects Under Section 7

The previous Solicitor's Opinions used concepts developed in NEPA law 2/ which should not be applied, without modification, to section 7 consultations. The first reason is that the

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2/ The Council on Environmental Quality regulations implementing the National Environmental Policy Act (NEPA), 42 U.S.C. § 4332(2)(C), define the term "cumulative impact" as --

> the impact on the environment which results from the incremental impact of the action when added to other past, present, and reasonably foreseeable future actions regardless of what agency (Federal or non-Federal) or person undertakes such other actions. Cumulative impacts can result from individually minor but collectively significant actions taking place over a period of time.

40 CFR 1508.7 (1980).

substantive consequences of requiring such cumulative effects to be considered under section 7 differ from the procedural consequences of environmental planning statutes such as NEPA. Section 7 is a substantive statute which provides:

> Each federal agency shall, in consultation with and with the assistance of the Secretary [of the Interior or Commerce], insure that any action authorized, funded or carried out by such agency . . . is not likely to jeopardize the continued existence of any endangered species or threatened species or result in the destruction or adverse modification of habitat of such species which is determined by the Secretary, after consultation as appropriate with the affected States, to be critical. . . .

16 U.S.C. 1536(a)(2). The Supreme Court, in interpreting a slightly different, earlier version of section 7, has noted the difference from NEPA:

> NEPA essentially imposes a procedural requirement on agencies, requiring them to engage in an extensive inquiry as to the effect of federal actions on the environment; by way of contrast, [section 7 of] the 1973 Act is substantive in effect, designed to prevent the loss of any endangered species, regardless of the cost.

Tennessee Valley Authority v. Hill, 437 U.S. 153, 188 n.34 (1978) (Emphasis in original).

A wholesale adoption of the cumulative effects approach under NEPA is thus inappropriate because prerequisite authority for a proposed action subject to consultation could be denied because

of the effects of other speculative and unrelated future actions which might be likely to jeopardize a listed species. This substantive result is quite different from that under planning statutes such an NEPA, where an analysis of the cumulative effects of other unrelated future actions means only that such effects be considered before proceeding with the proposed action undergoing environmental review. See, Natural Resources Defense Council v. Calloway, 524 F.2d 79 (2d Cir. 1979).

The second reason for not adopting NEPA's approach to cumulative effects analysis under section 7 is that all other future federal actions will themselves be subject to the restraints of section 7 at some later date. It is, therefore, more appropriate to consider the effects of future federal actions in a given area at the time consultation under section 7 is initiated for those actions. That is, the impact of future federal projects should be addressed sequentially, rather than collectively, since each must be capable at some point of individually satisfying the standards of section 7. Thus for federal projects, section 7 provides a "first-in-time, first-in-right" process whereby the authorization of federal projects may proceed until it is determined that further actions are likely to jeopardize the continued existence of a listed species or adversely modify its critical habitat. Environmental planning statutes such as NEPA do not impose such substantive limitations on future federal conduct, and so it is more appropriate for them to require the collective consideration of reasonably foreseeable, future federal activities. The substantive nature of section 7, however, suggests that a project-by-project sequential review of federal actions is a more appropriate approach for endangered species consultation.

A recent case which considered NEPA and the ESA side by side in a given factual situation implicitly recognized different approaches for cumulative impact analysis under NEPA and the ESA, requiring broad agency consideration of cumulative impacts under NEPA while focusing on a more limited analysis of impacts under section 7.

In North Slope Borough v. Andrus, 486 F. Supp. 332 (D.D.C. 1980), revd. on other grounds, 642 F.2d 589 (D.C. Cir. 1980), the court considered NEPA and ESA compliance for offshore oil and gas leasing. Both the district and appeals courts held that the cumulative effects of "other significant Federal and state energy development projects . . . in progress and planned for the North Slope Region," had to be considered in the EIS. 486 F. Supp. at 347; 642 F.2d at 600. The cumulative effects

of these other actions, however, were not mentioned by either court in their discussion of the proper scope of agency review under section 7. Instead, for section 7 purposes, the courts only focused on the impacts of the lease sale itself. 486 F. Supp. at 350-51; 642 F.2d at 608-609. Thus, though both courts required consideration of the cumulative effects of unrelated future state and federal actions for purposes of NEPA, each implicitly endorsed a more limited review of the leasing proposal under section 7.

Section 7 Consultation Process

Having concluded that limited analysis of cumulative effects is required under section 7, we will now discuss how that analysis should occur.

Obviously the first task in consultation is to define the scope of the project under review. In the case of construction activities, a "project" is both the proposed activity itself and any "connected" activity as well. Connected activities are those which are related to (interrelated) or dependent upon (interdependent) a proposed project. Interdependent actions are those which have no independent utility apart from the proposed project. Interrelated actions are those which are part of a larger project and cannot proceed unless other actions are taken previously or simultaneously. 3/ Thus, in the case of a resevoir project with a proposed lattice work of irrigation canals, in all likelihood the canals would be considered part of the "project" for purposes of section 7 consultation because it is unlikely that they would have any independent utility but for the impoundment.

3/ See Sierra Club v. Calloway, 499 F.2d 982 (5th Cir. 1974); Friends of the Earth v. Coleman, 518 F.2d 323 (9th Cir. 1975); Trout Unlimited v. Morton, 509 F.2d 1276 (9th Cir. 1974); Sierra Club v. Stamm, 507 F.2d 788 (8th Cir. 1974); Sierra Club v. Froehlke, 392 F. Supp. 130 (D. Mo. 1975), aff'd 534 F.2d 1289 (5th Cir. 1975); Environmental Defense Fund v. Armstrong, 356 F. Supp. 131 (N.D. Cal. 1973), aff'd 487 F. 2d 814 (9th Cir. 1974); 40 C.F.R. § 1508.25(a).

See also Atchison, Topeka and Sante Fe R.R. v. Callaway, 382 F. Supp. 610 (D.D.C. 1974); City of Rochester v. U.S. Post Office, 541 F.2d 967 (2d Cir. 1976)

Once the "project" has been defined, the consultation team should then focus on analyzing the environmental baseline in the affected area. This is necessary for determining what the environmental "status quo" is going to be at the time of consultation on the proposed project. The impacts of the project under review should then be measured against this environmental baseline.

In determining the environmental baseline, the consultation team should consider the <u>past</u> and <u>present</u> impacts of <u>all</u> projects and human activities in the area, regardless of whether they are federal, state or private in nature. This is logical since the actual impacts of these projects and activities are not dependent upon the origin of their sponsorship; rather, they all are contributing influences which mold the present environmental status quo of any given area.

Furthermore, the consultation team should consider as part of the environmental baseline the anticipated impacts of all <u>proposed</u> federal projects in the affected area which have previously been the subject of section 7 consultation and received a favorable biological opinion. This is consistent with the "first-in-time, first-in-right" approach discussed earlier, since a project passing muster under section 7 is in effect allocated the right to consume (and is presumed to utilize) a certain portion of the remaining natural resources of the area. It is this "cushion" of remaining natural resources which is available for allocation to projects until the utilization is such that any future use may be likely to jeopardize a listed species or adversely modify or destroy its critical habitat. 4/ At this point, any additional federal activity in the area requiring a further consumption of resources would be precluded under section 7.

However, the consultation team should not consider as part of the environmental baseline the anticipated impacts of future federal projects which have <u>not</u> been previously reviewed under section 7. Those projects are not part of the environmental

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4/ We recognize that a determination of the size of this so called "cushion" may be difficult to make in some instances and may escape enacting delineation and consist of merely a range of anticipated impacts and effects. Nevertheless, we conclude that the 1979 Amendments to the Act requires some sort of final biological analysis and recommendation to result from the consultation process. 125 Cong. Rec. 9650 (Oct. 24, 1979); H.R. Rep. No. 697 96th Cong., 1st Sess. 12 (1979).

baseline and have not had their priority set under the first-in-time system. They would undergo separate review by the consultation team and could only be authorized if it was subsequently concluded that a sufficient "resource cushion" still remained, or if an exemption was granted by the Endangered Species Committee under subsection 7(h) of the ESA.

The impact of state or private actions which are contemporaneous with the consultation in process should also be factored into the environmental baseline for the project area.

Having thus established an environmental baseline, the consultation team must then determine what the direct and indirect effects of the project under review will be. Such effects must be analyzed as part of the consultation process. See Tennessee Valley Authority v. Hill, 439 U.S. 153 (1978); National Wildlife Federation v. Coleman, 529 F. 2d 1064 (5th Cir. 1976); See also North Slope Borough, v. Andrus, 486 F. Supp. 332 (D.D.C.), aff'd in part and rev'd in part, 642 F.2d 589 (D.C. Cir. 1980).

Finally, the consultation team should consider the "cumulative impacts" of future state or private sections where such actions are reasonably certain to occur prior to the completion of the federal project. A non-federal action is "reasonably certain" to occur if the action requires the approval of a state or local resource or land use control agency and such agencies have approved the action, and the project is ready to proceed. Other indicators which may also support such a determination include whether the project sponsors provide assurance that the action will proceed, whether contracting has been initiated, whether there is obligated venture capital, or whether State or local planning agencies indicate that grant of authority for the action is imminent. These indicators must show more than the possibility that the non-federal project will occur; they must demonstrate with reasonable certainty that it will occur. The more that state or local administrative discretion remains to be exercised before a proposed state or private action can proceed, the less there is reasonable certainty that the project will be authorized. In summary, the consultation team should consider only those state or private projects which satisfy all major land use requirements and which appear to be economically viable.

J. Roy Spradley, Jr.

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FWS.RM.0590

Memorandum

To: Regional Director, Region 6, Fish and Wildlife Service

From: Regional Solicitor, Rocky Mountain Region

Subject: Request for Legal Opinion Concerning Section 7 Consultation for Mining Claim Lands Patented by the BLM (Bureau of Land Management)

In your memorandum of January 17, 1990, you asked a series of questions on BLM's authority and responsibility to consult under section 7 of the ESA (Endangered Species Act) when issuing mineral patents. Your Helena field office is concerned because proposed activities on lands patented by BLM are within important grizzly bear habitat in the Cabinet Mountain-Yaak ecosystem. These actions may also require approval from the Forest Service.

Although the background information relates only to mineral patents issued under the mining law, 30 U.S.C. 21 et seq., the questions are broadly worded and could apply to any patenting action by the BLM. However, BLM issues patents under numerous authorities and the answers to the questions would be different for different authorities. Therefore, I will respond to your questions only in reference to BLM's authority to issue patents for mining claims.

1. Your first questions are, "Does the Act and Section 7 consultation apply to the Bureau (nondiscretionary actions) which patent public lands to private ownership? Are they indeed nondiscretionary?"

Consultation under section 7 of the Endangered Species Act only is required for actions which are authorized, funded, or carried out by Federal agencies, 16 U.S.C. 1536(a)(2), and for which there is discretionary Federal involvement or control, 50 C.F.R. § 402.03. Thus, Federal actions which do not authorize, fund, or carry out actions are not covered by the section 7. There are two factors that need to be examined to answer your questions. One factor is what authorization, if any, is given by BLM when it issues a mineral patent and, second, what discretion does BLM have when requested to issue a mineral patent.

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In State of South Dakota v. Andrus, 462 F. Supp. 905 (D.S.D. 1978), aff'd, 614 F.2d 1190 (8th Cir. 1980), cert. denie 449 U.S. 822 (1980), the courts were asked whether or not an environmental impact statement was required before BLM issued a mineral patent. Precisely the same factors were discussed in both the district and appellate court decisions. The district court at 909 noted:

> Unlike the cases where a federal license, permit, or lease is required before the private party can begin a particular project in question, the locator of a mining claim may begin his mining operation without a mineral patent. 1/ As the United States Supreme Court stated in Union Oil Co. of California v. Smith, 249 U.S. 337 (remaining cites omitted).
>
> "[A] discovery of mineral by a qualified locator on unappropriated public land initiates rights much more substantial as against the United States and all the world. If he locates, marks, and records his claim in accordance with section 2324 and the pertinent local laws and regulations, he has, by the terms of section 2322, an exclusive right of possession to the extent of his claim as located, with the right to extract the minerals, even to exhaustion, without paying any royalty to the United States as owner, and without ever applying for patent or seeking to obtain title to the fee * * *." (Emphasis added.)

The appellate court at 1194 reaffirmed this position by stating:

> But in the instant case, the granting of a mineral patent does not enable the private party, Pittsburg, to do anything. Unlike the case where a lease, permit or license is required before the particular project can begin, the issuance of a mineral patent is not a precondition which enables a party to begin mining operations. 30 U.S.C. § 26.

However, the vested right to the issuance of a patent does not arise until there has been full compliance with the extensive statutory procedures. Preese v. United States, 639 F.2d 754 (Ct. Cl. 1981). Until the claim is patented, the United States retains

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1/ However, the mining laws provide BLM with regulatory authority over prepatent mining activities to prevent unnecessary degradation and to protect nonmineral resources of the Federal lands. 30 U.S.C. 22; 43 C.F.R. § 3809. The regulations at section 3809.1-6(5) state that approval of operation plans are subject to the ESA. Thus, although a mineral patent is not needed before exploration or mine operation may begin, approval may be required under BLM regulations and such approvals could trigger section 7. (Copy of BLM regulations attached.)

superior rights in the property. Freese v. United States, 6 Cl. Ct. 1 (1984). A patent merely confirms in document form a right that was already granted by operation of law when the mining claimant fulfilled all the required location and application procedures. Therefore, a mineral patent is not a Federal authorization. Since issuance of a mineral patent is not an authorization, it is not the type of Federal action covered by section 7(b)(2) of the Endangered Species Act. 16 U.S.C. 1536(b)(2).

Additionally, the only discretion BLM has when issuing a mineral patent is to determine if the statutory procedural prerequisites for patent issuance are met. This was made clear by the district court in the South Dakota case when it quoted from The American Law of Mining at section 9.04:

> It has been contended, unsuccessfully, that the granting of a mineral patent is a matter which is "by law committed to agency discretion." This view fails to recognize the fundamental distinction between the mining laws and the mineral leasing laws. Under the mineral leasing laws the Secretary may, in his discretion, refuse to issue any lease or prospecting permit at all on a given tract. The locator of a mining claim, however, holds his claim by virtue of an Act of Congress. Upon compliance with the requirements of the mining laws, he is entitled to a patent, and the Secretary has no discretion to deny an application for mineral patent where all the requirements of the law have been met. Thus, in the mining laws, Congress chose a method of disposing of public lands whereby the recipient of the grant had only to prove that he met the requirements of law in order to have the rights he obtained by location confirmed by patent. The power confided by the Secretary with respect to the issuance of mineral patents is not that of granting or denying a privilege but of determining whether an existing privilege conferred by Congress has been lawfully exercised. The distinction between the power of the Secretary to issue a mineral patent and his power to issue a mineral lease or permit is the distinction between a positive mandate to the Secretary and permission to take certain action in his discretion. Nevertheless the Secretary's not authorized to issue a patent until he is satisfied that the requirements of the law have been complied with * * *. (Emphasis added.)

Thus, once the all statutory requirements are met, BLM, if requested, must issue a mineral patent and issuance of a patent can be compelled by court order. Southwest Resource Council v. United States, 94 I.D. 56 (1987). Therefore, the issuance of a mineral patent is a nondiscretionary duty and is exempted from the section 7 consultation process. 50 C.F.R. § 402.03.

However, as discussed above, prepatent activities are subject to section 7 consultation and FWS should strive to deal with proble before patenting is initiated.

2. Your second question is, "Can the Service recommend/require restrictive easements during the patenting process on these lands to protect threatened or endangered species?"

I do not know what is meant by "restrictive easements." BLM has no authority to impose terms and conditions in a mineral patent to mitigate adverse environmental effects. See Deffebach v. Hawke, 115 U.S. 392 (1885); Utah Wilderness Assoc. v. United States, 91 I.D. 165 (1984).

3. Your third question is, "If the answer to one is yes, should not the Service request that the Bureau consult on patenting actions that may affect threatened or endangered species?"

No answer is required since the answers to your first questions are no.

4. Your fourth question is, "Likewise, can the Service request that the Bureau consult and possible reclaim title (through land exchanges) to lands they patented in the past?"

Since there is no agency action pending on the patents and since mineral patents are not covered by section 7, there is no action on which to consult. Therefore, although the Service may request consultation, BLM would have no authority to comply with your request. However, if future authorizations were to be needed from the BLM or from the Forest Service in order to carry out the mining activity on the patented lands, there would be an agency actions on which to consult. And, the Service could, through the biological opinion, recommend a land exchange in order to offset a potential jeopardy situation or incorporate a land exchange in a conservation recommendation. Land exchanges may also be utilized to minimize incidental take situations.

5. Your fifth question is, "In relation to the above questions, is there a difference in patenting procedures between mineral claims and mill site claims that may allow them to protect mill site claims proposed to be patented?"

The answer to this has not been determined. The statute on patents for mill sites, 30 U.S.C. 42, states that mill site patent requests "may" be included in applications for mineral patents and mill sites "may" be patented as part of the patent for the mineral lands. The term "may" leaves open the possibility of discretionary determinations by BLM on whether or not to patent the mill site or to include conditions for "mitigation." We are not aware of any cases on this issue. A court could interpret that BLM has no discretion as is the case with valid mineral patent applications or has great discretion.

6. Your sixth questions are, "Does the Bureau have discretionary authority over any part of the patenting process or subsequent granting of access to the patented claim (i.e., rights-of-way)? If so, can the Service request consultation on the whole action via the rights-of-way (mitigation for the whole action)?"

As discussed above, there is no discretion over the patenting process under the mining law once the requirements for obtaining a patent have been met. Generally, rights-of-way for patented lands located within public lands are granted because the patent landowner has an implied easement of access to the patented land. Additionally, if the patented land is surrounded by public lands, Congress has stated that a right-of-way shall be granted. 16 U.S.C. § 3210(b). Under either scenario, BLM has the authority to impose conditions in the right-of-way permit to protect environmental resources.

Furthermore, the rights-of-way can be issued under the Federal Land Policy and Management Act which provides:

> Each right-of-way shall contain -
> (a) Terms and conditions which will * * * (ii) minimize damage to scenic and esthetic values and fish and wildlife habitat and otherwise protect the environment * * *. 16 U.S.C. 1765

Additionally, under section 7(a)(1) of the ESA, BLM is to utilize its programs to conserve threatened and endangered wildlife. Therefore, the BLM has the responsibility as well as the authority to include measures to protect threatened or endangered species as terms and conditions in right-of-way permits issued under these authorities.

The second part of your sixth question involves the scope of the action subject to consultation. Any impact of activities that are or will occur on the patented lands must be considered in the section 7 consultation on the right-of-way. Such impact would either be part of the "effects of the action" or part of the "cumulative effects," 50 C.F.R. 402.02, and should be analyzed in the opinion.

The Service could develop reasonable and prudent alternatives, reasonable and prudent measures, or conservation recommendations that would apply to the patented lands as well as the right-of-way lands if such measures are needed in order to offset jeopardy, to minimize incidental take, or to offset adverse impacts to the grizzly bears. These should be included in any biological opinion on the rights-of-way.

However, since BLM may not agree with the terms and conditions advocated by FWS, it is important that FWS involve BLM and rights-of-way applicants in identifying alternatives and other measures when preparing its biological opinions as provided for in the section 7 regulations. See 50 C.F.R. 402.13(g)(5).

If you have any questions, please call Margot Zallen at 236-8444.

Margot Zallen

Margot Zallen
For the Regional Solicitor
Rocky Mountain Region

Attachment

cc: Assistant Solicitor, Branch of Fish and Wildlife, Division of Conservation and Wildlife

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IN REPLY REFER TO:
FWE/Section 7 Policy
MAIL STOP 60123

MAR 26 1990

Memorandum

To: Director, FWS, Washington, D.C. (AFWE/EHC/BFA)

From: Deputy Regional Director, Region 6

Subject: Section 7 Consultation for Mining Claim Lands Patented by the Bureau of Land Management

Attached is a March 1, 1990, Regional Solicitor's opinion concerning Section 7 consultation for mining claim lands patented by the Bureau of Land Management (BLM). A request (attached) for this opinion was made through the Fish and Wildlife Enhancement Helena Field Office but would apply throughout the United States.

According to the opinion, the issuance of a mineral patent would be exempt from the Section 7 process. However, prepatent activities are subject to Section 7 consultation as would rights-of-way for patented lands located within public lands or if the patented land is surrounded by public lands. In addition, if future authorizations were needed from BLM or from the Forest Service to carry out the mining activity on the patented lands, there would be agency actions on which to consult. Also, the Fish and Wildlife Service could, through the biological opinion, recommend a land exchange to offset a potential jeopardy situation or incorporate a land exchange in a conservation recommendation. Land exchanges also may be utilized to minimize incidental take situations.

If you have any questions, please contact Wayne Wathen at (303) 236-8166 or FTS 776-8166.

JOHN L. SPINKS, JR.

Attachments

cc: Regional Directors (FWE)
Regions 1, 2, 3, 4, 5, 7
w/attachments

§ 3802.6 Public availability of information.

(a) Except as provided herein, all information and data, including plans of operation, submitted by the operator shall be available for examination by the public at the office of the authorized officer in accordance with the provisions of the Freedom of Information Act (F.O.I.A.).

(b) Information and data submitted and specifically identified by the operator as containing trade secrets or confidential or privileged commercial or financial information and so determined by the authorized officer will not be available for public examination.

(c) The determination concerning specific information which may be withheld from public examination will be made in accordance with the rules in 43 CFR Part 2.

Subpart 3809—Surface Management

AUTHORITY: Sec. 2319 (30 U.S.C. 22); 3478 (43 U.S.C. 1201) of the Revised Statutes and the Federal Land Policy and Management Act of 1976 (43 U.S.C. 1781 et seq.).

SOURCE: 45 FR 78909, Nov. 26, 1980, unless otherwise noted.

NOTE: The information collection requirements contained in subpart have been approved by the Office of Management and Budget under 44 U.S.C. 3507 and assigned clearance number 1004-0184. This information is needed to permit the authorized officer to determine if a plan of operation is needed to protect the public lands and their resources and to determine if the plan of operations, if one is required, is adequate. The obligation to respond is required to obtain a benefit.

[48 FR 8818, Mar. 2, 1983]

GENERAL

§ 3809.0–1 Purpose.

The purpose of this subpart is to establish procedures to prevent unnecessary or undue degradation of Federal lands which may result from operations authorized by the mining laws.

§ 3809.0–2 Objectives.

The objectives of this regulation are to:

(a) Provide for mineral entry, exploration, location, operations, and purchase pursuant to the mining laws in a manner that will not unduly hinder such activities but will assure that these activities are conducted in a manner that will prevent unnecessary or undue degradation and provide protection of nonmineral resources of the Federal lands;

(b) Provide for reclamation of disturbed areas; and

(c) Coordinate, to the greatest extent possible, with appropriate State agencies, procedures for prevention of unnecessary or undue degradation with respect to mineral operations.

§ 3809.0–3 Authority.

(a) Section 2319 of the Revised Statutes (30 U.S.C. 22 *et seq.*) provides that exploration, location and purchase of valuable mineral deposits, under the mining laws, on Federal lands shall be "under regulations prescribed by law," and section 3478 of the Revised Statutes, as amended (43 U.S.C. 1201), provides that these regulations shall be issued by the Secretary.

(b) Sections 302, 303, 601, and 603 of the Federal and Policy and Management Act of 1976 (43 U.S.C. 1701 *et seq.*) require the Secretary to take any action, by regulation or otherwise, to prevent unnecessary or undue degradation of the Federal lands, provide for enforcement of these regulations, and direct the Secretary to manage the California Desert Conservation Area under reasonable regulations which will protect the scenic, scientific, and environmental values against undue impairment, and to assure against pollution of streams and waters.

(c) The Act of July 23, 1955 (30 U.S.C. 612), provides that rights under mining claims located after July 23, 1955, shall prior to issuance of patent therefor, be subject to the right of the United States to manage and dispose of the vegetative surface resources and to manage other surface resources. The Act also provides that "Any mining claim hereafter located under the mining laws of the United States shall not be used, prior to issuance to patent therefor, for any purposes other than prospecting, mining or

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processing operations and uses reasonably incident thereto."

(d) Section 9 of the Wild and Scenic Rivers Act (16 U.S.C. 1280) provides that regulations issued shall, among other things, provide safeguards against pollution of the rivers involved and unnecessary impairment of the scenery within the area designated for potential addition to, or an actual component of the national wild and scenic rivers system.

§ 3809.0-5 Definitions.

As used in this subpart, the term:

(a) "Authorized officer" means any employee of the Bureau of Land Management to whom authority has been delegated to perform the duties described in this subpart.

(b) "Casual Use" means activities ordinarily resulting in only negligible disturbance of the Federal lands and resources. For example, activities are generally considered "casual use" if they do not involve the use of mechanized earth moving equipment or explosives or do not involve the use of motorized vehicles in areas designated as closed to off-road vehicles as defined in Subpart 8340 of this title.

(c) "Federal lands" means lands subject to the mining laws including, but not limited to, the certain "public lands" defined in section 103 of the Federal Land Policy and Management Act of 1976. Federal lands does not include lands in the National Park System, National Forest System, and the National Wildlife Refuge System, nor does it include acquired lands, Stockraising Homestead lands or lands where only the mineral interest is reserved to the United States or lands under Wilderness Review and administered by the Bureau of Land Management (these lands are subject to the 43 CFR Part 3803 regulations).

(d) "Mining claim" means any unpatented mining claim, millsite, or tunnel site located under the mining laws and those patented mining claims and millsites located in the California Desert Conservation Area which have been patented subsequent to the enactment of the Federal Land Policy and Management Act of October 21, 1976.

(e) "Mining laws" means the Lode Law of July 26, 1866, as amended (14 Stat. 251); the Placer Law of July 9, 1870, as amended (16 Stat. 217); and the Mining Law of May 10, 1872, as amended (17 Stat. 91); and all laws supplementing and amending these laws, including among others the Building Stone Act of August 4, 1892, as amended (27 Stat. 348); and the Saline Placer Act of January 31, 1901 (31 Stat. 745).

(f) "Operations" means all functions, work, facilities, and activities in connection with prospecting, discovery and assessment work, development, construction, and processing of mineral deposits locatable under the mining laws and all other uses reasonably incident thereto, whether on a mining claim or not, including but not limited to the construction of roads, transmission lines, pipelines, and other means of access for support facilities across Federal lands subject to these regulations.

(g) "Operator" means a person conducting or proposing to conduct operations.

(h) "Person" means any citizen of the United States or person who has declared the intention to become such and includes any individual, partnership, corporation, association, or other legal entity.

(i) "Project area" means a single tract of land upon which an operator is, or will be, conducting operations. It may include one mining claim or a group of mining claims under one ownership on which operations are or will be conducted, as well as Federal lands on which an operator is exploring or prospecting prior to locating a mining claim.

(j) "Reclamation" means taking such reasonable measures as will prevent unnecessary or undue degradation of the Federal lands, including reshaping land disturbed by operations to an appropriate contour and, where necessary, revegetating disturbed areas so as to provide a diverse vegetative cover. Reclamation may not be required where the retention of a stable highwall or other mine workings is needed to preserve evidence of mineralization.

(k) "Unnecessary or undue degradation" means surface disturbance great-

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er than what would normally result when an activity is being accomplished by a prudent operator in usual, customary, and proficient operations of similar character and taking into consideration the effects of operations on other resources and land uses, including those resources and uses outside the area of operations. Failure to initiate and complete reasonable mitigation measures, including reclamation of disturbed areas or creation of a nuisance may constitute unnecessary or undue degradation. Failure to comply with applicable environmental protection statutes and regulations thereunder will constitute unnecessary or undue degradation. Where specific statutory authority requires the attainment of a stated level of protection or reclamation, such as in the California Desert Conservation Area, Wild and Scenic Rivers, areas designated as part of the National Wilderness System administered by the Bureau of Land Management and other such areas, that level of protection shall be met.

[45 FR 78909, Nov. 26, 1980; 46 FR 55634, Dec. 17, 1980, as amended at 48 FR 9816, Mar. 2, 1983]

§ 3809.0-6 Policy.

Consistent with section 2 of the Mining and Mineral Policy Act of 1970 and section 102(a) (7), (8), and (12) of the Federal Land Policy and Management Act, it is the policy of the Department of the Interior to encourage the development of Federal mineral resources and reclamation of disturbed lands. Under the mining laws a person has a statutory right, consistent with departmental regulations, to go upon the open (unappropriated and unreserved) Federal lands for the purpose of mineral prospecting, exploration, development, extraction and other uses reasonably incident thereto. This statutory right carries with it the responsibility to assure that operations include adequate and responsible measures to prevent unnecessary or undue degradation of the Federal lands and to provide for reasonable reclamation.

§ 3809.1 Operations.

§ 3809.1-1 Reclamation.

All operations, whether casual, under a notice, or by a plan of operations, shall be reclaimed as required in this title.

§ 3809.1-2 Casual use: Negligible disturbance.

No notification to or approval by the authorized officer is required for casual use operations. However, casual use operations are subject to monitoring by the authorized officer to ensure that unnecessary or undue degradation of Federal lands will not occur.

§ 3809.1-3 Notice: Disturbance of 5 acres or less.

(a) All operators on project areas whose operations, including access across Federal lands to the project area, cause a cumulative surface disturbance of 5 acres or less during any calendar year shall notify the authorized officer in the District office of the Bureau of Land Management having jurisdiction over the land in which the claim(s) or project area is located. Prior to conducting additional operations under a subsequent notice covering substantially the same ground, the operator shall have completed reclamation of operations which were conducted under any previous notice. Notification of such activities, by the operator, shall be made at least 15 calendar days before commencing operations under this subpart by a written notice or letter.

(b) Approval of a notice, by the authorized officer, is not required. Consultation with the authorized officer may be required under paragraph (c)(3) of this section when the construction of access routes are involved. Notices properly filed under this section constitute authorization under Part 8340 of this title (Off-Road Vehicles).

(c) The notice or letter shall include:

(1) Name and mailing address of the mining claimant and operator, if other than the claimant. Any change of operator or in the mailing address of the mining claimant or operator shall be

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reported promptly to the authorized officer;

(2) When applicable, the name of the mining claim(s), and serial number(s) assigned to the mining claim(s) recorded pursuant to Subpart 3833 of this title on which disturbance will likely take place as a result of the operations;

(3) A statement describing the activities proposed and their location in sufficient detail to locate the activities on the ground, and giving the approximate date when operations will start. The statement shall include a description and location of access routes to be constructed and the type of equipment to be used in their construction. Access routes shall be planned for only the minimum width needed for operations and shall follow natural contours, where practicable, to minimize cut and fill. When the construction of access routes involves slopes which require cuts on the inside edge in excess of 3 feet, the operator may be required to consult with the authorized officer concerning the most appropriate location of the access route prior to commencing operations;

(4) A statement that reclamation of all areas disturbed will be completed to the standard described in § 3809.1-3(d) of this title and that reasonable measures will be taken to prevent unnecessary or undue degradation of the Federal lands during operations.

(d) The following standards govern activities conducted under a notice:

(1) Access routes shall be planned for only the minimum width needed for operations and shall follow natural contours, where practicable to minimize cut and fill.

(2) All tailings, dumps, deleterious materials or substances, and other waste produced by the operations shall be disposed of so as to prevent unnecessary or undue degradation and in accordance with applicable Federal and State laws.

(3) At the earliest feasible time, the operator shall reclaim the area disturbed, except to the extent necessary to preserve evidence of mineralization, by taking reasonable measures to prevent or control on-site and off-site damage of the Federal lands.

(4) Reclamation shall include, but shall not be limited to:

(i) Saving of topsoil for final application after reshaping of disturbed areas have been completed;

(ii) Measures to control erosion, landslides, and water runoff;

(iii) Measures to isolate, remove, or control toxic materials;

(iv) Reshaping the area disturbed, application of the topsoil, and revegetation of disturbed areas, where reasonably practicable; and

(v) Rehabilitation of fisheries and wildlife habitat.

(5) When reclamation of the disturbed area has been completed except to the extent necessary to preserve evidence of mineralization, the authorized officer shall be notified so that an inspection of the area can be made.

(e) Operations conducted pursuant to this subpart are subject to monitoring by the authorized officer to ensure that operators are conducting operations in a manner which will not cause unnecessary or undue degradation.

(f) Failure of the operator to prevent undue or unnecessary degradation or to complete reclamation to the standards described in this subpart may cause the operator to be subject to a notice of noncompliance as described in § 3809.3-2 of this title.

[48 FR 70060, Nov. 7, 1983; 48 FR 52804, Dec. 17, 1983, as amended at 49 FR 6814, Mar. 2, 1984]

§ 3809.1-4 Plan of operations: When required.

An approved plan of operations is required prior to commencing:

(a) Operations which exceed the disturbance level (5 acres) described in § 3809.1-3 of this title.

(b) Any operation, except casual use, in the following designated areas:

(1) Lands in the California Desert Conservation Area designated as 'controlled' or 'limited' use areas by the California Desert Conservation Area plan;

(2) Areas designated for potential addition to, or an actual component of the national wild and scenic rivers system.

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(3) Designated Areas of Critical Environmental Concern;

(4) Areas designated as part of the National Wilderness Preservation System and administered by the Bureau of Land Management;

(5) Areas designated as "closed" to off-road vehicle use as defined in Subpart 8340 of this title.

(c) Plans properly filed and approved under this section constitute authorization under Part 8340 of this title (Off-Road Vehicles).

[45 FR 78908, Nov. 26, 1980; 46 FR 55834, Dec. 17, 1980, as amended at 48 FR 8816, Mar. 2, 1983]

§ 3809.1-5 Filing and contents of plan of operations.

(a) A plan of operations must be filed in the District Office of the Bureau of Land Management having jurisdiction over the Federal lands in which the claim(s) or project area is located.

(b) No special form is required for filing a plan.

(c) The plan shall include:

(1) The name and mailing address of the operator (and claimant if not the operator). Any change of operator or change in the mailing address shall be promptly reported to the authorized officer;

(2) A map, preferably a topographic map, or sketch showing existing and/or proposed routes of access, aircraft landing areas, or other means of access, and size of each area where surface disturbance will occur;

(3) When applicable, the name of the mining claim(s) and mining claim serial numbers assigned to the mining claim(s) recorded pursuant to Subpart 3833 of this title.

(4) Information sufficient to describe or identify the type of operations proposed, how they will be conducted and the period during which the proposed activity will take place;

(5) Measures to be taken to prevent unnecessary or undue degradation and measures to reclaim disturbed areas resulting from the proposed operations, including the standards listed in § 3809.1-3(d) of this title. Where an operator advises the authorized officer that he/she does not have the necessary technical resources to develop such measures the authorized officer will assist the operator in developing such measures. If an operator submits reclamation measures, the authorized officer will ensure that the operator's plan is sufficient to prevent unnecessary or undue degradation. All reclamation measures developed by the operator, or by the authorized officer in conjunction with the operator, shall become a part of the plan of operations.

(6) Measures to be taken during extended periods of nonoperation to maintain the area in a safe and clean manner and to reclaim the land to avoid erosion and other adverse impacts. If not filed at the time of plan submittal, this information shall be filed with the authorized officer whenever the operator anticipates a period of nonoperation.

[45 FR 78908, Nov. 26, 1980; 46 FR 55834, Dec. 17, 1980]

§ 3809.1-6 Plan approval.

(a) A proposed plan of operations shall be submitted to the authorized officer, who shall promptly acknowledge receipt thereof to the operator. The authorized officer shall, within 30 days of such receipt, analyze the proposal in the context of the requirement to prevent unnecessary or undue degradation and provide for reasonable reclamation, and shall notify the operator:

(1) That the plan is approved; or

(2) Of any changes in or additions to the plan necessary to meet the requirements of these regulations; or

(3) That the plan is being reviewed but that a specified amount of time, not to exceed an additional 60 days, is necessary to complete the review, setting forth the circumstances which justify additional time for review. However, days during which the area of operations is inaccessible for inspection shall not be counted when computing the 60 day period; or

(4) That the plan cannot be approved until 30 days after a final environmental statement has been prepared and filed with the Environmental Protection Agency; or

(5) That the plan cannot be approved until the authorized officer has

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complied with section 106 of the National Historic Preservation Act or section 7 of the Endangered Species Act.

(b) The authorized officer shall consult with the appropriate official of the bureau or agency having surface management responsibilities where such responsibility is not exercised by the Bureau of Land Management. Prior to plan approval the authorized officer shall obtain the concurrence of such appropriate official to the terms and conditions that may be needed to prevent unnecessary or undue degradation.

(c) The authorized officer shall undertake an appropriate level of cultural resource inventory of the area to be disturbed. The inventory shall be completed within the time allowed by these regulations for approval of the plan (30 days). The operator is not required to do the inventory but may hire an archaeologist approved by the Bureau of Land Management in order to complete the inventory more expeditiously. The responsibility for and cost of salvage of cultural resources discovered during the inventory shall be the Federal Government's. The responsibility of avoiding adverse impacts on those cultural resources discovered during the inventory shall be the operator's.

(d) Pending final approval of the plan, the authorized officer shall approve any operations that may be necessary for timely compliance with requirements of Federal and State laws, subject to any terms and conditions that may be needed to prevent unnecessary or undue degradation.

(e) In the event of a change of operators involving an approved plan of operations, the new operator shall satisfy the requirements of § 3809.1-9 of this title as it relates to bonding.

[48 FR 75668, Nov. 28, 1980; 48 FR 53934, Dec. 17, 1980]

§ 3809.1-7 Modification of plan.

(a) At any time during operations under an approved plan, the operator on his/her own initiative may modify the plan or the authorized officer may request the operator to do so.

(b) A significant modification of an approved plan must be reviewed and approved by the authorized officer in the same manner as the initial plan.

(c)(1) If, when requested to do so by the authorized officer, the operator does not furnish a proposed modification within a reasonable time, usually 30 days, the authorized officer may recommend to the State Director that the operator be required to submit a proposed modification of the plan. The recommendation of the authorized officer shall be accompanied by a statement setting forth the facts and the reasons for the recommendation.

(2) In acting upon such recommendations the State Director shall determine, within 30 days, whether:

(i) All reasonable measures were taken by the authorized officer at the time the plan was approved to ensure that the proposed operations would not cause unnecessary or undue degradation of the Federal land;

(ii) The disturbance from the operations of the plan as approved or from unforeseen circumstances is or may become of such significance that modification of the plan is essential in order to prevent unnecessary or undue degradation; and

(iii) The disturbance can be minimized using reasonable means.

(3) Once the matter has been sent to the State Director, an operator is not required to submit a proposed modification of an approved plan until a determination is made by the State Director. Where the State Director determines that a plan shall be modified the operator shall timely submit a modified plan to the authorized officer for review and approval.

(4) Operations may continue in accordance with the approved plan until a modified plan is approved, unless the State Director determines that the operations are causing unnecessary or undue degradation to the land. The State Director shall advise the operator of those reasonable measures needed to avoid such degradation and the operator shall immediately take all necessary steps to implement those measures within a reasonable period established by the State Director.

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§ 3809.1-8 Existing operations.

(a) Persons conducting operations on the effective date of these regulations, who would be required to submit a notice under § 3809.1-3 or a plan of operations under § 3809.1-4 of this title may continue operations but shall, within:

(1) 30 days submit a notice with required information outlined in § 3809.1-3 of this title for operations where 5 acres or less will be disturbed during a calendar year; or

(2) 120 days submit a plan in those areas identified in § 3809.1-4 of this title. Upon a showing of good cause, the authorized officer may grant an extension of time, not to exceed an additional 180 days, to submit a plan.

(b) Operations may continue according to the submitted plan during its review. If the authorized officer determines that operations are causing unnecessary or undue degradation of the Federal lands involved, the authorized officer shall advise the operator of those reasonable measures needed to avoid such degradation, and the operator shall take all necessary steps to implement those measures within a reasonable time recommended by the authorized officer. During the period of an appeal, if any, operations may continue without change, subject to other applicable Federal and State laws.

(c) Upon approval of a plan by the authorized officer, operations shall be conducted in accordance with the approval plan.

[45 FR 78909, Nov. 26, 1980; 45 FR 82804, Dec. 17, 1980]

§ 3809.1-9 Bonding requirements.

(a) No bond shall be required for operations that constitute casual use (§ 3809.1-2) or that are conducted under a notice (§ 3809.1-3 of this title).

(b) Any operator who conducts operations under an approved plan of operations as described in § 3809.1-5 of this title may, at the discretion of the authorized officer, be required to furnish a bond in an amount specified by the authorized officer. The authorized officer may determine not to require a bond in circumstances where operations would cause only minimal disturbance to the land. In determining the amount of the bond, the authorized officer shall consider the estimated cost of reasonable stabilization and reclamation of areas disturbed. In lieu of the submission of a separate bond, the authorized officer may accept evidence of an existing bond pursuant to State law or regulations for the same area covered by the plan of operations, upon a determination that the coverage would be equivalent to that provided in this section.

(c) In lieu of a bond, the operator may deposit and maintain in a Federal depository account of the United States Treasury, as directed by the authorized officer, cash in an amount equal to the required dollar amount of the bond or negotiable securities of the United States having a market value at the time of deposit of not less than the required dollar amount of the bond.

(d) In place of the individual bond on each separate operation, a blanket bond covering statewide or nationwide operations may be furnished at the option of the operator, if the terms and conditions, as determined by the authorized officer, are sufficient to comply with these regulations.

(e) In the event that an approved plan is modified in accordance with § 3809.1-7 of this title, the authorized officer shall review the initial bond for adequacy and, if necessary, adjust the amount of the bond to conform to the plan as modified.

(f) When all or any portion of the reclamation has been completed in accordance with the approved plan, the operator may notify the authorized officer that such reclamation has occurred and that she/he seeks a reduction in bond or Bureau approval of the adequacy of the reclamation, or both. Upon any such notification, the authorized officer shall promptly inspect the reclaimed area with the operator. The authorized officer shall then notify the operator, in writing, whether the reclamation is acceptable. When the authorized officer has accepted as completed any portion of the reclamation, the authorized officer shall authorize that the bond be reduced proportionally to cover the remaining reclamation to be accomplished.

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(g) When a mining claim is patented, the authorized officer shall release the operator from that portion of the performance bond which applies to operations within the boundaries of the patented land. The authorized officer shall release the operator from the remainder of the performance bond, including the portion covering approved means of access outside the boundaries of the mining claim, when the operator has completed acceptable reclamation. However, existing access to patented mining claims, if across Federal lands shall continue to be regulated under the approved plan. The provisions of this subsection do not apply to patents issued on mining claims within the boundaries of the California Desert Conservation Area (see § 3809.8 of this title).

[48 FR 70868, Nov. 28, 1983; 48 FR 53904, Dec. 17, 1983]

§ 3809.3 Prevention of unnecessary or undue degradation.

§ 3809.3-1 Environmental assessment.

(a) When an operator files a plan of operations or a significant modification which encompasses land not previously covered by an approved plan, the authorized officer shall make an environmental assessment or a supplement thereto to identify the impacts of the proposed operations on the lands and to determine whether an environmental impact statement is required.

(b) In conjunction with the operator, the authorized officer shall use the environmental assessment to determine the adequacy of mitigating measures and reclamation procedures included in the plan to insure the prevention of unnecessary or undue degradation of the land. If an operator advises the authorized officer that he/she is unable to prepare mitigating measures, the authorized officer, in conjunction with the operator, shall use the environmental assessment as a basis for assisting the operator in developing such measures.

(c) If, as a result of the environmental assessment, the authorized officer determines that there is "substantial public interest" in the plan, the authorized officer shall notify the operator, in writing, that an additional period of time, not to exceed additional 60 days provided for ap a plan in § 3809.1-4 of this ti quired to consider public com the environmental assessment

[48 FR 70868, Nov. 28, 1983; 48 Dec. 17, 1983, as amended at 49 Mar. 2, 1984]

§ 3809.3-2 Other requirements environmental protection.

All operations, including ex and operations under either (§ 3809.1-3) or a plan of op (§ 3809.1-4 of this title), shall ducted to prevent unnecess undue degradation of the lands and shall comply with a ment Federal and State laws, i but not limited to the following

(a) *Air quality.* All operati comply with applicable Fede State air quality standards, i the Clean Air Act (42 U.S.C. seq.).

(b) *Water quality.* All operati comply with applicable Fede State water quality standards, ing the Federal Water Pollut trol Act, as amended (30 U.S.C. seq.).

(c) *Solid wastes.* All operati comply with applicable Fede State standards for the dispo treatment of solid wastes, in regulations issued pursuant Solid Waste Disposal Act, as a by the Resource Conservation covery Act (42 U.S.C. 6901 *et s* garbage, refuse or waste shall be removed from the affected l disposed of or treated to minim far as is practicable, its impact lands.

(d) *Fisheries, wildlife and habitat.* The operator shall tak action as may be needed to prev verse impacts to threatened or gered species, and their habitat may be affected by operations.

(e) *Cultural and paleontologi sources.* (1) Operators shall not ingly disturb, alter, injure, or any scientifically important pa logical remains or any historical chaeological site, structure, buil object on Federal lands.

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(2) Operators shall immediately bring to the attention of the authorized officer any cultural and/or paleontological resources that might be altered or destroyed on Federal lands by his/her operations, and shall leave such discovery intact until told to proceed by the authorized officer. The authorized officer shall evaluate the discoveries brought to his/her attention, take action to protect or remove the resource, and allow operations to proceed within 10 working days after notification to the authorized officer of such discovery.

(3) The Federal Government shall have the responsibility and bear the cost of investigations and salvage of cultural and paleontology values discovered after a plan of operations has been approved, or where a plan is not involved.

(f) *Protection of survey monuments.* To the extent practicable, all operators shall protect all survey monuments, witness corners, reference monuments, bearing trees and line trees against unnecessary or undue destruction, obliteration or damage. If, in the course of operations, any monuments, corners, or accessories are destroyed, obliterated or damaged by such operations, the operator shall immediately report the matter to the authorized officer. The authorized officer shall prescribe, in writing, the requirements for the restoration or reestablishment of monuments, corners, bearing and line trees.

[48 FR 78960, Nov. 28, 1980; 43 FR 62934, Dec. 17, 1980, as amended at 48 FR 52218, Nov. 3, 1983]

§ 3809.3 General provisions.

§ 3809.3-1 Applicability of State law.

(a) Nothing in this subpart shall be construed to effect a preemption of State laws and regulations relating to land conduct of operations or reclamation on Federal lands under the mining laws.

(b) After the publication date of these regulations the Director, Bureau of Land Management, shall conduct a review of State laws and regulations in effect or due to come into effect, relating to unnecessary or undue degradation of lands disturbed by exploration for, or mining of, minerals locatable under the mining laws.

(c) The Director may consult with appropriate representatives of each State to formulate and enter into agreements to provide for a joint Federal-State program for administration and enforcement. The purpose of such agreements is to prevent unnecessary or undue degradation of the Federal lands from operations which are conducted under the mining laws, to prevent unnecessary administrative delay and to avoid duplication of administration and enforcement of laws. Such agreements may, whenever possible, provide for State administration and enforcement of such programs.

[48 FR 78960, Nov. 28, 1980; 48 FR 52934, Dec. 17, 1980]

§ 3809.3-2 Noncompliance.

(a) Failure of an operator to file a notice under § 3809.1-3 of this title or a plan of operations under § 3809.1-4 of this title will subject the operator, at the discretion of the authorized officer, to being served a notice of noncompliance or enjoined from the continuation of such operations by a court order until such time as a notice or plan is filed with the authorized officer. The operator shall also be responsible to reclaim operations conducted without an approved plan of operations or prior to the filing of a required notice.

(b) Failure to reclaim areas disturbed by operations under § 3809.1-3 of this title is a violation of these regulations.

(1) Where an operator is conducting operations covered by 3809.1-3 (notice) of this title and fails to comply with the provisions of that section or properly conduct reclamation according to standards set forth in 3809.1-3(d) of this title, a notice of noncompliance shall be served by delivery in person to the operator or his/her authorized agent, or by certified mail addressed to his/her address of record.

(2) Operators conducting operations under an approved plan of operations who fails to follow the approved plan of operations may be subject to a notice of noncompliance. A notice of noncompliance shall be served in the

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same manner as described in § 3809.3-2(b)(1) of this section.

(c) All operators who conduct operations under a notice pursuant to § 3809.1-2 and a plan pursuant to § 3809.1-4 of this title on Federal lands without taking the actions specified in a notice of noncompliance within the time specified therein may be enjoined by an appropriate court order from continuing such operations and be liable for damages for such unlawful acts.

(d) A notice of noncompliance shall specify in what respects the operator is failing or has failed to comply with the requirements of applicable regulations, and shall specify the actions which are in violation of the regulations and the actions which shall be taken to correct the noncompliance and the time, not to exceed 30 days, within which corrective action shall be started.

(e) Failure of an operator to take necessary actions on a notice of noncompliance, may constitute justification for requiring the submission of a plan of operations under § 3809.1-5 of this title, and mandatory bonding for subsequent operations which would otherwise be conducted pursuant to a notice under § 3809.1-3 of this title.

[45 FR 78060, Nov. 28, 1980; 45 FR 83934, Dec. 17, 1980]

§ 3809.3-2 Access.

(a) An operator is entitled to access to his operations consistent with provisions of the mining laws.

(b) Where a notice or a plan of operations is required, it shall specify the location of access routes for operations and other conditions necessary to prevent unnecessary or undue degradation. The authorized officer may require the operator to use existing roads to minimize the number of access routes, and, if practicable, to construct access roads within a designated transportation or utility corridor. When commercial hauling is involved and the use of an existing road is required, the authorized officer may require the operator to make appropriate arrangements for use and maintenance.

§ 3809.3-4 Fire prevention and c

The operator shall comply applicable Federal and State and regulations, and shall tak reasonable measures to prevent press fires in the area of opera

§ 3809.3-5 Maintenance and pub

During all operations, the shall maintain his structures ment, and other facilities in a orderly manner. Hazardous conditions resulting from op shall be marked by signs, fe otherwise identified to alert th in accordance with applicable and State laws and regulations.

§ 3809.3-6 Inspection.

The authorized officer may cally inspect operations to det if the operator is complying wit regulations. The operator shall the authorized officer access purpose.

§ 3809.3-7 Periods of non-operatio

All operators shall maintain t structures and other facilities operations in a safe and clean tion during any non-operating p All operators may be required an extended period of non-op for other than seasonal operati remove all structures, equipme other facilities and reclaim the operations, unless he/she receiv mission, in writing, from the a head officer to do otherwise.

§ 3809.4 Appeals.

(a) Any operator adversely af by a decision of the authorized made pursuant to the provisio this subpart shall have a rig appeal to the State Director, thereafter to the Board of Lan peals, Office of Hearings and Ap pursuant to Part 4 of this title. State Director's decision is adver the appellant.

(b) No appeal shall be consid unless it is filed, in writing, in office of the authorized officer made the decision from which appeal is being taken, within 30 after the date of receipt of the sion. A decision of the authorized

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cer from which an appeal is taken to the State Director shall be effective during the pendency of an appeal. A request for a stay may accompany the appeal.

(c) The appeal to the State Director shall contain:

(1) The name and mailing address of the appellant.

(2) When applicable, the name of the mining claim(s) and serial number(s) assigned to the mining claims recorded pursuant to Subpart 3833 of this title which are subject to the appeal.

(3) A statement of the reasons for the appeal and any arguments the appellant wishes to present which would justify reversal or modification of the decision.

(d) The State Director shall promptly render a decision on the appeal. The decision shall be in writing and shall set forth the reasons for the decision. The decision shall be sent to the appellant by certified mail, return receipt requested.

(e) The decision of the State Director, when adverse to the appellant, may be appealed to the Board of Land Appeals, Office of Hearings and Appeals, pursuant to Part 4 of this title.

(f) Any party, other than the operator, aggrieved by a decision of the authorized officer shall utilize the appeals procedures in Part 4 of this title. The filing of such an appeal shall not stay the authorized officer's decision from being effective.

(g) Neither the decision of the authorized officer nor the State Director shall be construed as final agency action for the purpose of judicial review of that decision.

[45 FR 78909, Nov. 28, 1980, as amended at 48 FR 5818, Mar. 2, 1983]

3809.5 Public availability of information.

(a) Information and data submitted and specifically identified by the operator as containing trade secrets or confidential or privileged commercial or financial information shall not be available for public examination. Other information and data submitted by the operator shall be available for examination by the public at the offices of the authorized officer in accordance with the provisions of the Freedom of Information Act.

(b) The determination concerning specific information which may be withheld from public examination shall be made in accordance with the rules in 43 CFR Part 2.

3809.6 Special provisions relating to mining claims patented within the boundaries of the California Desert Conservation Area.

In accordance with section 601(f) of the Federal Land Policy and Management Act of October 21, 1976, all patents issued on mining claims located within the boundaries of the California Desert Conservation Area after the enactment of the Federal Land Policy and Management Act shall be subject to the regulations in this part, including the continuation of a plan of operations and of bonding with respect to the land covered by the patent.

PART 3810—LANDS AND MINERALS SUBJECT TO LOCATION

Subpart 3811—Lands Subject to Location and Purchase

Sec.
3811.1 Lands: General.
3811.2 Lands: Specific.
3811.2-1 States where locations may be made.
3811.2-2 Lands in national parks and national monuments.
3811.2-3 Lands in Indian reservations.
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Subpart 3812—Minerals Under the Mining Laws

3812.1 Minerals subject to location.

Subpart 3813—Disposal of Reserved Minerals Under the Act of July 17, 1914

3813.0-3 Authority.

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FWE
MAIL STOP 60120

JAN 17 1990

Memorandum

To: Regional Solicitor, USDI, Denver, Colorado

From: Regional Director, Region 6

Subject: Request for Legal Opinion Concerning Section 7 Consultations for Mining Claim Lands Patented by the Bureau of Land Management

The Fish and Wildlife Enhancement Office, Helena, Montana, is currently involved in Section 7 informal consultation with the Forest Service concerning development of two of the world's largest silver producing mines ($3 billion in reserves) located in the Cabinet Mountains of northwest Montana. The Forest Service is estimating that they will request formal consultation with us in early spring of 1990.

The grizzly bear population in the Cabinet-Yaak Ecosystem is in a tenuous position and has been the subject of numerous mining and timber related Section 7 consultations and the focal point of augmentation discussions. The Forest Service has preliminarily concluded that the mines will modify and disturb grizzly bear habitat and increase the risk of bear mortality through increased human-bear interactions. As a means of offsetting these adverse impacts, the Forest Service is considering permit requirements which would protect (through fee title transfer or easement) recently patented lands from future development.

The lands subject to possible protective measures lie adjacent to the Cabinet Mountains Wilderness Area within important grizzly bear habitat (Management Situation 1).

Approximately 123 surface acres which overlie the ore body claims were patented by ASARCO in April 1989. No mining development of these lands is anticipated because the ore body and mine entrances are located several thousand vertical feet down the mountain. The patented acres are now private lands subject to developments or other private actions (recreational uses are most likely) which may adversely affect grizzly bears.

Relatedly, both mining companies, ASARCO and Noranda, hold other unproven mineral claims (there are over 7,000 claims in the Cabinet Mountains) in the same area which potentially could be patented. Both companies also hold numerous mill site claims within valuable grizzly bear habitat which may be patented after the companies occupy the lands. Potentially patented mill site claims could be developed as commercial recreational facilities following closure of the mines (15 year life). This may represent the greatest threat to the grizzly bear because Section 7 consultation is not required for private actions.

As we understand the process, the Forest Service "proves" mineral and mill site claims and gives a report to the Bureau of Land Management (Bureau) which may patent the mineral and surface rights to the mining company. The Helena office contacted the Montana State Office of the Bureau concerning these matters (Janet Bejot, Chief of Solid Minerals Adjudication Section, Division of Mineral Resources). After consulting with her Washington Office, Mrs. Bejot stated that the Endangered Species Act does not apply to their patenting process and that the Fish and Wildlife Service (Service) could not reserve easements on patented lands for protection of grizzly bears. This conclusion was apparently based on the Bureau's assumption that mineral and surface patenting are exempt from the Endangered Species Act (Act) as nondiscretionary actions.

Several questions arise, aside from the propriety of the Service accepting or proposing as "reasonable and prudent alternatives," protection of patented land owned by a mining company as mitigation for an action related to the patenting of those lands:

1. Does the Act and Section 7 consultation apply to the Bureau (nondiscretionary actions) which patent public lands to private ownership? Are they indeed nondiscretionary? (Reference: Whooping Crane Trust v. Federal Energy Regulatory Commission)

2. Can the Service recommend/require restrictive easements during the patenting process on these lands to protect threatened or endangered species?

3. If the answer to one is yes, should not the Service request that the Bureau consult on patenting actions that may affect threatened or endangered species?

4. Likewise, can the Service request that the Bureau consult and possibly reclaim title (through land exchanges) to lands they patented in the past?

5. In relation to the above questions, is there a difference in patenting procedures between mineral claims and mill site claims that may allow them to protect mill site claims proposed to be patented?

6. Does the Bureau have discretionary authority over any part of the patenting process or subsequent granting of access to the patented claim (i.e., rights-of-way)? If so, can the Service request consultation on the whole action via the rights-of-way (mitigation for the whole action)?

Mineral claims may be patented by the Bureau at any time. The legal opinion to the questions asked herein will, to a large degree, determine the Service's "no jeopardy/jeopardy" call and the formulation of reasonable and prudent alternatives, if any, when formal consultation is requested. We request your immediate attention to this issue.

[redacted]

50-5

United States Departm

OFFICE OF THE
SOUTHEAST REGIC

Richard B. Russell Federal Building
75 Spring Street, S.W.
Atlanta, Georgia 30303

IN REPLY REFER TO:
SCS
FWS.SE.0680
92-6-2230
LG-13

July 9, 1992

MEMORANDUM

TO: John R. Eaddie, Acting Regional Director, FWS (Atlanta)

FROM: Roger Sumner Babb, Regional Solicitor Southeast Region (Atlanta)

SUBJECT: The Legal Sufficiency of the Biological Opinion for Inner-Perimeter Road, Lowndes County, Georgia

In a memorandum dated June 17, 1992, you requested legal review of the Biological Opinion ("Opinion") prepared by the Brunswick Field Office for an after-the-fact wetlands dredge and fill permit application. Lowndes County, Georgia began dredge and fill operations without the requisite § 404 permit. The Corps of Engineers ordered the county to cease and desist. The county requested after-the-fact authorization to leave the fill that was already placed in the wetlands and to finish the road. The Corps of Engineers requested consultation with the Fish and Wildlife Service regarding this after-the-fact permit application.

The memorandum contains two requests. The first request is for this office to provide comments on the legality of statements made in the Opinion, particularly those statements concerning incidental take. The second request is for this office to advise the Service as to the best means, legally, of accepting the applicant's offer to acquire 122 acres of habitat, despite the position in the Opinion that 190 acres of habitat are required to comply with the Opinion. The Service has indicated that it does not wish to reinitiate consultation in order to resolve the issue. The two requests will be addressed separately below.

The Legal Adequacy of the Biological Opinion

The Opinion Incorrectly Interprets the Incidental Take Statement Provisions of Sections 7(b)(4) and 7(o)

Prior to the 1982 Amendments to the Endangered Species Act, a Federal agency or permit applicant could insure that a project complied with the "no jeopard" provisions of section 7(a)(2) and yet remain liable for any violation of section 9 resulting from takings incidental to the approved action. The 1982 Amendments corrected this situation by creating the "incidental take statement." Pub. L. No. 97-304, 96 Stat. 1411.

The incidental take provision found at section 7(o)(2) provides that "any taking that is in compliance with the terms and conditions specified in a written statement provided under subsection (b)(4)(iv) of this section shall not be considered to be a prohibited taking of the species concerned." 16 U.S.C. § 1536(o)(2) (1988). Section 7(b)(4) provides:

> (4) If after consultation under subsection (a)(2) of this section, the Secretary concludes that-
>
> (A) the agency action will not violate such subsection, or offers reasonable and prudent alternatives which the Secretary believes would not violate such subsection;
>
> (B) the taking of an endangered species or a threatened species incidental to the agency action will not violate such subsection; and
>
> (C) if an endangered species or threatened species of a marine mammal is involved, the taking is authorized pursuant to section 1371(a)(5) of this title;
>
> the Secretary shall provide the Federal agency and the applicant concerned, if any, with a written statement that-
>
> (i) specifies the impact of such incidental taking on the species,
>
> (ii) specifies those reasonable and prudent measures that the Secretary considers necessary or appropriate to minimize such impact,
>
> (iii) in the case of marine mammals, specifies those measures that are necessary to comply with section 1371(a)(5) of this title with regard to such taking, and

> (iv) sets forth the terms and conditions (including, but not limited to, reporting requirements) that must be complied with by the Federal agency or applicant (if any), or both, to implement the measures specified under clauses (ii) and (iii).
> 16 U.S.C. § 1536(b)(4) (1988) (emphasis added).

The Act thus provides that "no jeopardy" opinions must provide an incidental take statement to the extent that incidental takings will not create a "jeopardy" situation.[1] The Opinion declined to provide an incidental take statement for uncompleted portions of the road project, stating "[b]ecause excessive take has already occurred in violation of Section 7(d) and possibly Section 9 of the Endangered Species Act, the Service will not authorize further incidental take for this project." Opinion p.10. To properly decline to authorize "further incidental take" the Opinion would need to make a finding that any incidental take would be likely to jeopardize the continued survival of the species under consideration. The Opinion does not make such a finding and the refusal to insulate the remaining portion of this project from potential section 9 liability is therefore not in conformance with section 7(b) or 50 C.F.R. § 402.14(i).

The decision to deny incidental take authorization is especially troublesome in this instance because the reason set forth is that "excessive take has already occurred in violation of section 7(d) and possibly section 9." Opinion p. 10. The Opinion does not provide sufficient discussion of the biological evidence to support a finding that excessive take has occurred. In fact, this statement is preceded in the Opinion by a statement that "we believe direct and/or indirect mortality of wood storks, red-cockaded woodpeckers and Eastern indigo snakes may have occurred as a result of this project. The precise level of take is not known at the present time." Opinion p.9 (emphasis added). The Opinion indicates that the habitat impacted by the project is suitable for a number of protected species. The Opinion then concludes that the habitat is actually utilized: by Eastern indigo snakes based on a report of a road-kill in the "mid-seventies", the presence of an active gopher tortoise burrow in the vicinity of the project and a reference to sightings of the snake on both sides of the project; by red-cockaded woodpeckers based on a sighting within three miles of the project in 1988; and by wood storks based on sightings of storks feeding in the area and because the project is within the foraging range of a known wood stork rookery. Even if the impacted habitat were conclusively occupied or utilized by

---

[1]. If the action agency and the Service do not expect the project to cause any incidental take, then the Service is not required to issue an incidental take statement. National Wildlife Federation v. National Park Service, 669 F. Supp. 384, 389 (D. Wyo. 1987).

the protected species, the issue remains whether the adverse modification of this habitat actually caused a taking. To establish a taking based on habitat modification, there need be a showing that the habitat modification actually killed or injured a protected species by significantly impairing essential behavioral patterns, including breeding, feeding or sheltering. 50 C.F.R. § 17.3 (1991); See also Palila v. Hawaii Dep't of Land and Natural Resources, 649 F. Supp. 1070 (D. Haw. 1986) aff'd, 852 F.2d 1106 (9th Cir. 1988); Sierra Club v. Lyng 694 F. Supp. 1260 (E.D. Tex. 1988) aff'd in part, vacated in part sub nom. Sierra Club v. Yeutter 926 F.2d 429 (5th Cir. 1991). The Opinion does not address this standard and the conclusion that "excessive take has already occurred" is therefore without support. Opinion p.10.

Despite the fact that the Opinion declines to authorize incidental takings for the remaining portions of the project, the Opinion proceeds to issue "reasonable and prudent measures" and "terms and conditions" in order to "immediately compensate for the unauthorized take that has occurred." Opinion p. 10. The functional purpose of "reasonable and prudent measure" and "terms and conditions" is to provide the parameters within which a Federal agency or applicant must stay to receive the protection of an incidental take statement. See 16 U.S.C. § 1536(o)(2) (1988); 50 C.F.R. § 402.14(i)(5) (1991). They are not intended as a vehicle for compensating past unauthorized takings. In addition, to the extent that the Opinion, through the reasonable and prudent measures and terms and conditions, serves in effect to insulate past unauthorized takings from section 9 liability, it is disapproved by case law. In Defenders of Wildlife v. Administrator, E.P.A., 882 F.2d 1294 (8th Cir. 1989), the Eighth Circuit stated, "[u]nder the ESA, however, an agency must obtain an incidental take statement before it takes the protected species. The 1988 FWS statement does not retroactively excuse the takings that occurred before the Secretary issued the statement." Id. at 1301 (emphasis added).

Furthermore, even if after-the-fact incidental take statements were allowed, this project would not qualify because any takings that occurred would not fall within the definition of "incidental take" provided at 50 C.F.R. § 402.02, which states "[i]ncidental take refers to takings that result from, but are not the purpose of, carrying out an otherwise lawful activity...." 50 C.F.R. § 402.02 (1991). The Service indicated in its 1986 discussion of the regulations that "otherwise lawful activities are those actions that meet all State and Federal legal requirements except for the prohibition against taking in section 9 of the Act." 51 Fed. Reg. 19,926 (June 3, 1986). This project was not in compliance with the Federal legal requirements established by the Clean Water Act and thus, if any takings occurred, they were not "incidental."

The Opinion's reasonable and prudent measures require acquisition of habitat that meets the requirements of, among other species, the

gopher tortoise, a candidate species. The Opinion's terms and conditions provide that "[t]he replacement habitat for... gopher tortoise, and Bachman's sparrow must be actively managed...." Opinion p. 11. Including these two candidate species in components of the incidental take statement is without legal support. The eastern population of the gopher tortoise and the Bachman's sparrow are not protected by the Endangered Species Act and the applicant therefore has no need for an incidental take statement which would provide insulation from section 9 liability for takings of these species. The Act and the Service regulations include a provision for consideration of proposed species in the consultation process, but are silent with respect to candidate species. See 16 U.S.C. § 1536(a)(4) (1988); 50 C.F.R. § 402.10 (1991). If the proposed project is likely to jeopardize the continued survival of a proposed species, a conference between the action agency and the Service is initiated. Id. Proposed species are dealt with through the conference and are not considered during the formal consultation. Id. The Service can only issue non-binding recommendations regarding proposed species. See 51 Fed. Reg. 19,926 (June 3, 1986). If desired, the Service could also provide an action agency with non-binding recommendations concerning candidate species. Id. These recommendations should be issued separately, however, to make clear that they are not part of the parameters of an incidental take statement. The Service could choose to include these recommendations as part of the conservation recommendations for the project.

The reasonable and prudent measures and the terms and conditions contained in this Opinion require extensive long-term management of acquired habitat. As such, they may exceed the bounds established by Service regulations, which provide that "reasonable and prudent measures, along with the terms and conditions that implement them, cannot alter the basic design, location, scope, duration, or timing of the action and may involve only minor changes." 50 C.F.R. § 402.14(i)(2) (1991).

The Opinion Incorrectly Finds A Violation of Section 7(d)

Section 7(d) provides that "[a]fter initiation of consultation required under subsection (a)(2)... the Federal agency and the permit or license applicant shall not make any irreversible or irretrievable commitment of resources with respect to the agency action...." 16 U.S.C. § 1536(d) (1988); See also 50 C.F.R. § 402.09 (1991). The County did not seek a section 404 permit from the Corps before constructing the road. At the time of the construction, no section 7 consultation had been initiated for the project. It is therefore not possible that the County's construction activities violated section 7(d), which applies only after consultation has been initiated. The Opinion correctly cites the Service regulations, but goes on to find a violation of section 7(d) despite the fact that all construction activity occurred prior to the initiation of consultation, stating "[b]ecause the project

has involved clearing of twelve miles of habitat without Federal permits, the Service considers this project to be in violation of section 7(d) of the Endangered Species Act." Opinion p. 9. This proposition is not supported by the language of the Act, the regulations, or by case law. See 16 U.S.C. § 1536(d) (1988); 50 C.F.R. § 402.09 (1991).

The Opinion also notes that "excessive take has already occurred in violation of section 7(d)...." Opinion p. 9. Incidental takings do not constitute a violation of section 7(d). The focus of section 7(d) is on the irreversible or irretrievable commitment of resources after initiation of consultation. Section 7(d) is violated if an irreversible or irretrievable commitment of resources is made during the consultation process irrespective of whether any takings occur as a result or not.

The Opinion Does Not Fully Address Effects of the Action or Cumulative Impacts

Section 7, as implemented by the regulations, requires the Service to consider the "effects of the action" and the "cumulative effects" of other actions in determining the likelihood of jeopardy. The "effects of the action" incorporates an environmental baseline within which the impact of the subject action can be determined. Service regulations define "effects of the action" as:

> the direct and indirect effects of an action on the species or critical habitat, together with the effects of other activities that are interrelated or interdependent with that action, that will be added to the environmental baseline. The environmental baseline includes the past and present impacts of all Federal, State, or private actions and other human activities in the action area, the anticipated impacts of all proposed Federal projects in the action area that have already undergone formal or early section 7 consultation, and the impact of State or private actions which are contemporaneous with the consultation in process. Indirect effects are those that are caused by the proposed action and are later in time, but still are reasonably certain to occur. Interrelated actions are those that are part of a larger action and depend on the larger action for their justification. Interdependent actions are those that have no independent utility apart from the action under consideration.
> 50 C.F.R. § 402.02 (1991).

Cumulative effects is defined as "those effects of future State or private activities, not involving Federal activities, that are

reasonably certain to occur within the action area of the Federal action subject to consultation." 50 C.F.R. § 402.02 (1991).

The Opinion does not provide any statement regarding either cumulative effects or indirect and interdependent effects in the action area. The Opinion's focus is on whether the already completed portions of the project resulted in jeopardy to any of the species under consideration. In fact, the Opinion does not even provide a determination of whether the direct effect of the portion of the project yet to be completed will likely adversely affect or jeopardize any of the protected species.

This Opinion highlights the difficulty with entering into consultation concerning after-the-fact permit authorization. Section 7 is inherently a forward-looking consultation process. The Service would have been better served by issuing a Biological Opinion for the uncompleted portion of the project only, treating the completed portion as State action which was "past or present" or "contemporaneous with the consultation in process." Recommendations to the Corps of Engineers concerning mitigation for a violation of section 404 could then have been made outside the context of section 7 consultation. It is likely that a forward-looking consultation concerning this project would have avoided the pitfalls associated with incidental take statements and the failure to consider fully the "effects of the action" and the "cumulative effects" of other actions.

The Legally Acceptable Method for Approving the Applicant's Offer to Acquire 122 Acres of Habitat

The Service has indicated that it believes the habitat that the applicant has offered to acquire may be superior to the habitat recommended in the Opinion. The Opinion notes that if the recommended habitat is not acquired, the applicant must propose acquisition of other habitat that is of equal or better quality. The applicant has made a proposal that the Service believes fulfills the requirement of the Opinion, despite the fact that the total acreage is less than that recommended by the Opinion. Normally, the Service could set forth in a written document separate from the Opinion the reasons why the applicant's proposal fulfills the requirement contained in the Opinion's reasonable and prudent measures. The Service could also modify the Opinion itself to provide the same information.

In this particular case, however, reinitiation of consultation and issuance of a revised Opinion may be necessary. Reinitiation is required principally as a result of a meeting between the Service and environmental groups on June 30, 1992, subsequent to the request to the Solicitor's Office for assistance. In the June 30 meeting, the Regional Counsel for the National Wildlife Federation protested that the Opinion did not consider secondary impacts of the project. The Service agreed that secondary impacts had not

been considered. The Service will therefore need to reinitiate consultation to avoid a procedural violation of section 7(a)(2). Reinitiation of consultation can be requested by the Service pursuant to 50 C.F.R. § 402.16, which provides in pertinent part:

> Reinitiation of formal consultation is required and shall be requested by the Federal agency or by the Service, where discretionary Federal involvement or control over the action has been retained or is authorized by law and:
>
> (b) If new information reveals effects of the action that may affect listed species or critical habitat in a manner or to an extent not previously considered; 50 C.F.R. § 402.16 (1991).

The reported recent changes in zoning on lands adjacent to the project are new information which would qualify under 50 C.F.R. § 402.16 because these zoning changes would not likely have occurred but for the Federal project. See 51 Fed. Reg. 19,926, 19,932 (June 3, 1986), Sierra Club v. Marsh, 816 F.2d 1376, 1387 (9th Cir. 1987) for a discussion of the "but for" test for determining whether an activity qualifies as an indirect effect.

The Service should consider all "effects of the action" and "cumulative effects" of non-Federal actions, as these terms are defined at 50 C.F.R. §402.02. It will be important to distinguish projects which will qualify for Nationwide wetland permits from those projects which are reasonably certain to require an individual section 404 permit. Projects which will require individual section 404 permits constitute future Federal action. If any of the future Federal actions do not meet the "but for" test for indirect effects, then they should not be considered in this Opinion. This is because the Service will have an opportunity for consultation during the future project's Federal permit application. See 51 Fed. Reg. 19,926 (June 3, 1986) for a discussion of the rationale for excluding future Federal projects from inclusion in the analysis of cumulative effects. Although the same rationale applies to future Federal actions that constitute indirect effects, the regulations make no distinction between indirect effects which are Federal and those which are State or private. The Service must therefore consider the impact of future Federal actions ~~that~~ qualify as indirect effects in this Opinion. (that meet the but-for test, therefor

The Service should issue an incidental take statement that covers the level of expected takings for the remainder of the project. The reasonable and prudent measures and the terms and conditions should not require more than is necessary to minimize the expected level of take. It is likely that the applicant will not need to acquire 122 acres of habitat to comply with the revised Opinion. The Service should therefore consider requesting the habitat acquisition as part of the conservation recommendations for this

project, or as part of the recommendations made pursuant to the Fish and Wildlife Coordination Act.

If you have any questions concerning this matter, please contact Sean C. Skaggs, an attorney in this office, at (404) 331-4950.

Roger Sumner Babb

DRAFT

ENDANGERED SPECIES ACT

INTRA-SERVICE CONSULTATION HANDBOOK

(730 FW 4B)

U.S. FISH AND WILDLIFE SERVICE

WASHINGTON D.C.

NOVEMBER 1994

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GOALS

Fish and Wildlife Service (Service) actions involving listed, proposed, and category 1 candidate species will promote the conservation of those species to the greatest extent practical under Federal law. This will be accomplished by ensuring that Service-sponsored, authorized, or funded programs:

- use the best scientific and commercial information available, including approved recovery plans, to assist Service decision makers;

- include the use of the best scientific and commercial data available for all section 7 evaluations, and provide the benefit of the doubt to the species if important scientific data are lacking;

- ensure an adequate buffer (degree of safety to the species) so that subsequent chance or recurring events (e.g., drought, fire, flooding, hurricanes, chemical spills, etc.) are not allowed to jeopardize the continued existence of these species; and

- promote and expand the species' opportunities for survival and recovery.

LISTED, PROPOSED, AND CANDIDATE SPECIES INFORMATION

Knowledge of what species occur in an action area, including information on their life histories, is integral to an intra-Service section 7 consultation. Ecological Services Offices (ESOs)* are responsible for providing lists of species and critical habitats to Service programs within their jurisdictions. Other Service units with responsibility for managing endangered and threatened species (e.g., Refuges, Hatcheries) are responsible for keeping ESO information bases updated for their lead species and critical habitats.

The Washington Office Division of Endangered Species will ensure that Regional Office divisions are furnished lists of endangered, threatened, proposed, and candidate species. Additional species information should be obtained from the ESOs with lead responsibilities for that species. The above responsibilities of the ESOs and other Service units do not remove from Project Leaders the responsibility to assess which listed, proposed, and category 1 candidate species occur within action areas.

*In this handbook, ESO includes the Regional or Washington Office Division of Endangered Species for consultations conducted at those levels.

FISH AND WILDLIFE SERVICE ACTIONS

The following is a partial list of Service actions that may be subject to section 7 consultation:

Ecological Services

Endangered species recovery plan implementation
Endangered Species Act section 10 permits*
Farm Bill activities
Partners for Wildlife
Private Lands initiatives
Contaminant cleanup, spills, response activities, remedial actions

Fisheries and Federal Aid

Endangered species recovery plan implementation
Wildlife Restoration Act and Sport Fish Restoration Act projects
Fisheries and Wildlife Assistance projects
Hatchery operations, endangered species projects, fish stocking, land acquisition, construction
Endangered Species Act section 6 projects
Fish management plans

Refuges and Wildlife

Endangered species recovery plan implementation
Refuge operation and maintenance
Refuge habitat management and improvement projects, public use programs, commercial activities, construction projects, land disposal
North American Waterfowl Management Plan activities
Pest control activities on refuge croplands

All

Endangered species recovery plan implementation
Information transfer (e.g., a Service publication on use of rotenone should caution against use where vulnerable listed or candidate species occur)
Superfund activities
Challenge grants
Partners in Flight

*Service activities such as marking, moving, and harassing that directly take endangered and threatened species may require a section 10(a)(1)(A) permit. This permit is subject to section 7 review and may require the issuance of a biological opinion, <u>especially</u> if takings are involved.

DEFINITIONS FOR INTRA-SERVICE CONSULTATIONS

Action - an activity or program of any kind authorized, funded, or carried out, in whole or in part, by the Service in the United States. Examples include, but are not limited to: (a) actions intended to conserve listed species or their habitat; (b) the promulgation of regulations; (c) the granting of licenses, contracts, leases, easements, rights-of-way, permits, or grants-in-aid; (d) actions directly or indirectly causing modifications to the land, water, or air; and (e) the funding of projects carried out by other Federal agencies, States, private individuals, and other parties. [50 CFR §402.02]

Action area - all areas to be affected directly or indirectly by the Service action, not merely the immediate area involved in the action. [50 CFR §402.02; Handbook section 4.5(A)]

Applicant - any person (an individual, corporation, partnership, trust, association, or any other private entity; or any officer, employee, agent, department, or instrumentality of the Federal Government, of any State, municipality, or political subdivision of a State, or of any foreign government; any State, municipality, or political subdivision of a State; or any other entity subject to the jurisdiction of the United States) who requires formal approval or authorization from the Service as a prerequisite to conducting the action. [50 CFR §402.02; Handbook section 2.2(E)]

Biological assessment - information prepared by, or under the direction of, the Service to determine whether a proposed action is likely to (1) adversely affect listed species or designated critical habitat, 2) jeopardize the survival of species that are proposed for listing or are category 1 candidates for listing, or (3) adversely modify proposed critical habitat. The outcome of this biological assessment determines whether formal consultation or a conference is necessary. [50 CFR §402.02, 50 CFR §402.12; Handbook section 3.4]

Biological opinion - document stating the opinion of the Fish and Wildlife Service or the National Marine Fisheries Service on whether or not a Fish and Wildlife Service action is likely to jeopardize the continued existence of listed species, or result in the destruction or adverse modification of critical habitat. [50 CFR §402.02; Handbook section 4.5(A)]

Candidate species - plant and animal taxa considered for possible addition to the List of Endangered and Threatened Species. [50 CFR §424.02(b)]

> **Candidate category 1** - taxa for which the Service has sufficient information on biological vulnerability and threat(s) to support proposals to list them as endangered or threatened species.
>
> **Candidate category 2** - taxa for which the Service has information indicating that proposing to list as endangered or threatened is possibly appropriate, but for which persuasive data on biological

vulnerability and threat are not currently available to support proposed rules.

Conference - a form of intra-agency cooperation involving discussions within the Service pursuant to section 7(a)(4) of the ESA. Conferences are required for Service actions likely to jeopardize species proposed for listing or category 1 candidates, or likely to adversely modify proposed critical habitat. Such conferences are designed to help the Service identify and resolve potential conflicts between an action and species conservation early in a project's planning. They should identity recommendations to minimize or avoid adverse effects. [50 CFR §402.02, §402.10; Handbook chapter 5]

Conservation - the terms "conserve," "conserving," and "conservation" mean to use, or the use of, all methods and procedures necessary to restore a listed species to the point at which ESA protection no longer is necessary. These methods and procedures include, but are not limited to, all activities associated with scientific resources management. Examples of such activities are research, census, law enforcement, habitat acquisition and maintenance, propagation, live trapping, and transportation, and -- in the extraordinary case where population pressures within a given ecosystem cannot otherwise be relieved -- regulated taking. [ESA §3(3)]

Conservation recommendations - suggestions resulting from formal or informal consultation that (1) identify discretionary measures the Service can take to minimize or avoid the adverse effects of a proposed action on listed species or critical habitat; (2) identify studies, monitoring, or research to develop new information on listed species or critical habitat; and (3) include suggestions on how the Service can assist species conservation, in association with the project, under the authority of section 7(a)(1) of ESA. [50 CFR §402.02; Handbook section 4.5(D)]

Constituent elements - physical and biological features of critical habitat including, but not limited to: (1) space for individual and population growth, and for normal behavior; (2) food, water, air, light, minerals, or other nutritional or physiological requirements; (3) cover or shelter; (4) sites for breeding, reproduction, rearing of offspring, germination, or seed dispersal; and generally, (5) habitats that are protected from disturbance or are representative of the historic geographic and ecological distributions of a species. [50 CFR 424.12(b)]

Critical habitat - (1) the specific areas within the geographical region occupied by the species at the time it is listed, on which are found those physical or biological features (a) essential to the conservation of the species and (b) which may require special management considerations or protection; and (2) specific areas outside the geographical area occupied by the species at the time it is listed, upon a determination by the Secretary that such areas are essential for the conservation of the species. Critical habitats are described in 50 CFR Parts 17 or 226.

Cumulative effects - An analysis of those effects of future State, local, or

private activities, not involving Federal activities, that are reasonably certain to occur within the action area of the Service action subject to consultation. [50 CFR §402.02; Handbook section 4.5(A)]

Destruction or adverse modification of critical habitat - a direct or indirect alteration that appreciably diminishes the value of critical habitat for both the survival and recovery of a listed species. Such alterations include, but are not limited to, alterations adversely modifying any of those physical and biological features (which may have been determined as constituent elements) that were the basis for determining the habitat to be critical. [50 CFR §402.02]

Effects of the action - direct and indirect effects of an action on the species or critical habitat, together with the effects of other activities that are interrelated or interdependent with that action. The effects of the action are considered along with the environmental baseline and the predicted cumulative effects to determine the overall effects to the species for purposes of preparing a biological opinion on the proposed action. [50 CFR §402.02; Handbook section 4.5(A)]

Endangered species - any species that is in danger of extinction throughout all or a significant portion of its range. [ESA §3(6)]

Environmental baseline - (1) past and current effects of all Federal, State, or private actions and other human activity in an action area, (2) the expected effects of all proposed Service projects in an action area that have already undergone formal or early section 7 consultation, and (3) the effect of State or private actions that are contemporaneous with the consultation currently being conducted. [50 CFR §402.02; Handbook section 4.5(A)]

ESA - the Endangered Species Act of 1973, as amended, 16 U.S.C. 1531 et seq.

Federal agency - any department, agency, or instrumentality of the United States. [ESA §3(7)]

Formal consultation - a process that determines whether a proposed Service action is likely to jeopardize the continued existence of listed species or destroy or adversely modify designated critical habitat. If a proposed Service action is likely to adversely affect listed species or designated critical habitat, formal consultation is required. The process (1) begins with the Service's written request and submittal of a complete initiation package; and (2) concludes with the issuance of a biological opinion and incidental take statement. Activities subject to consultation include proposed Service actions that are intended to benefit listed species but adversely affect other listed species or critical habitat in the process, or actions leaving residual adverse effects. [50 CFR §402.02, 50 CFR §402.14; Handbook chapter 4]

Incidental take - take of listed animal species that results from, but is not the purpose of, carrying out an otherwise lawful activity. [50 CFR §402.02;

Handbook section 4.5(B)]

Indirect effects - environmental effects that are caused by, or will result from, the proposed action and are later in time, but are still reasonably certain to occur. [50 CFR §402.02]

Informal consultation - an optional process that includes all intra-Service discussions and correspondence to determine whether a proposed Service action is likely to adversely affect listed species or critical habitat. If a proposed Service action is likely to result in adverse effects to listed species or designated critical habitat, formal consultation is required. This formal consultation requirement includes activities that will have an overall beneficial effect on a listed species, but would result in some adverse effects. [50 CFR §402.02, 50 CFR §402.13]

Interdependent actions - actions with no independent utility apart from the action being considered in a biological opinion. [50 CFR §402.02; Handbook section 4.4(A)]

Interrelated actions - actions that are part of a larger action and depend on the larger action for their justification. [50 CFR §402.02; Handbook section 4.4(A)]

Is likely to adversely affect - the appropriate conclusion if any adverse effect to listed species or critical habitat may occur as a direct or indirect result of the proposed action or its interrelated or interdependent actions. In the event the overall effect of the proposed action is beneficial to listed species or critical habitat, but is also likely to cause some adverse effects, the proposed action must be determined "is likely to adversely affect." Such a determination requires formal intra-Service section 7 consultation.

Is likely to jeopardize proposed species, category 1 candidates, or adversely modify proposed critical habitat - the appropriate conclusion when the Service identifies situations in which the proposed action is likely to jeopardize the continued existence of a species proposed for listing, category 1 candidates, or adversely modify an area proposed for designation as critical habitat. If this conclusion is reached, intra-Service conference is required.

Is not likely to adversely affect - the appropriate conclusion when effects on the species or critical habitat are expected to be beneficial, discountable, or insignificant. Beneficial effects have contemporaneous positive effects without any adverse effects to the species or habitat. [See Handbook page 2-3 for discussion of benefit for section 10(a)(1)(A) permits.] Insignificant effects relate to the size of the impact and should never reach the scale where take occurs. Discountable effects are those extremely unlikely to occur. Based on best judgment, a person would not (1) be able to meaningfully measure, detect, or evaluate insignificant effects or (2) expect discountable effects to occur.

Jeopardize the continued existence of - to engage in an action that reasonably

would be expected -- directly or indirectly -- to reduce appreciably the likelihood of both the survival and recovery of a listed species in the wild by reducing the reproduction, numbers, or distribution of that species. [50 CFR §402.02]

Listed species - any species of fish, wildlife, or plant that has been determined to be endangered or threatened under section 4 of ESA. [50 CFR §402.02]

Major construction activity - a construction project (or other undertaking having similar physical effects) that is a major Service action significantly affecting the quality of the human environment as referred to in the National Environmental Policy Act (NEPA, 42 U.S.C. 4332(2)(C)). The term encompasses dams, buildings, pipelines, roads, water resource developments, and other such undertakings that significantly modify the physical environment. [50 CFR §402.02]

Plant - any member of the plant kingdom, including seeds, roots, and other parts thereof [ESA §3(14)]

Programmatic consultation - consultation addressing the Service's multiple actions on a program, regional, or other basis. [Handbook section 4.7]

Proposed critical habitat - habitat proposed in the Federal Register to be designated, or added through a proposed revision, as critical habitat under section 4 of ESA for any listed or proposed species. [50 CFR §402.02]

Proposed species - any species of fish, wildlife, or plant that is proposed in the Federal Register for listing under section 4 of ESA. [50 CFR §402.02]

Reasonable and prudent alternatives - alternative actions identified during formal consultation that can be implemented in a manner consistent with the intended purpose of the action, that can be implemented consistent with the agency's legal authority and jurisdiction, that are economically and technologically feasible, and that the Director believes would avoid the likelihood of jeopardizing the continued existence of the listed species or the destruction or adverse modification of critical habitat. [50 CFR §402.02; Handbook section 4.5(A)]

Reasonable and prudent measures - actions the Director believes necessary or appropriate to minimize the effects (i.e., amount or extent) of incidental take. [50 CFR §402.02; Handbook section 4.5(B)]

Recovery - improvement in the status of listed species to the point at which listing is no longer appropriate under the criteria set out in section 4(a)(1) of ESA. [50 CFR §402.02]

Service - the Fish and Wildlife Service.

Species - any species or subspecies of fish, wildlife, or plants, and any

distinct population segment of any species of vertebrate fish or wildlife that interbreeds when mature.

Take - to harass, harm, pursue, hunt, shoot, wound, trap, capture, or collect or attempt to engage in any such conduct. Harm is further defined to include significant habitat modification or degradation that results in death or injury to listed species by significantly impairing behavioral patterns such as breeding, feeding, or sheltering. Harass is defined as actions that create the likelihood of injury to listed species to such an extent as to significantly disrupt normal behavior patterns which include, but are not limited to, breeding, feeding or sheltering.

Threatened species - any species likely to become an endangered species within the foreseeable future throughout all or a significant portion of its range. [ESA §3(20)]

BASIC PROCEDURES AND RESPONSIBILITIES

The timeframes and data requirements in the following procedures are the same for all Federal agencies, and follow the section 7 consultation regulations at 50 CFR Part 402, except that Service actions shall include consideration of category 1 candidate species as though proposed for listing.

Ask yourself the following:

(1) IS THERE A FEDERAL ACTION?

[Non-Federal action example: Within a Service unit, a private party is undertaking an action affecting a listed or proposed species pursuant to a private interest in land over which Service has no control.]

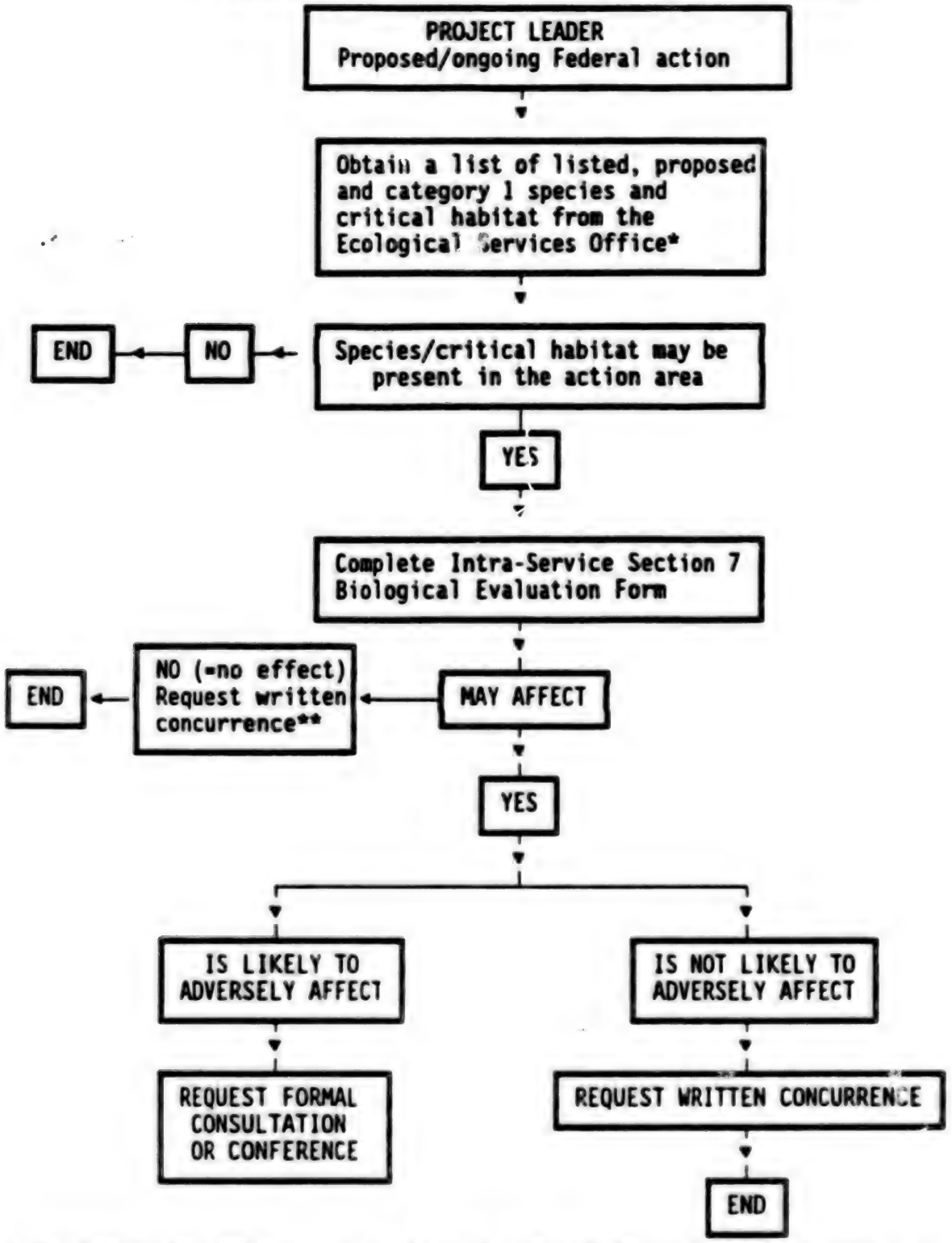
Federal actions include all activities or programs authorized, funded, carried out, or permitted -- in whole or in part -- by Federal agencies in the United States or on the high seas. Any Project Leader whose activities may affect listed species or designated critical habitat, proposed species or proposed critical habitat, or category 1 listing candidates must request consultation or conference. Consultation requirements apply to new projects and ongoing activities that "may" affect listed species or designated critical habitat. Conferences are required for actions that "are likely" to jeopardize proposed or category 1 candidate species, or adversely modify proposed critical habitat.

Consultations may consider either individual actions or a Service program as a whole. However, a programmatic consultation will not substitute for an individual project consultation, unless the programmatic analysis lays out the species-specific standards within which all individual activities will be conducted.

(2) ARE LISTED, PROPOSED, OR CATEGORY 1 CANDIDATE SPECIES OR THEIR HABITAT PRESENT?

The Project Leaders must first determine whether category 1 candidate, proposed, or listed species (or their habitats) occur -- or have the potential to occur -- in the action area. This may be done by reviewing agency records, contacting knowledgeable sources (State agencies, Natural Heritage Program offices, etc.), conducting surveys, and/or requesting a species list from the appropriate ESO. The ESOs are the primary contacts for intra-Service section 7 consultation. Project Leaders can contact the appropriate ESO to begin informal section 7 consultation or conference on the proposed action. ESO responsibilities include conducting informal section 7 consultation, assisting Project Leaders in evaluating effects of their proposed and existing actions, responding to species information requests, responding to concurrence requests, conducting informal conferences and issuing conference reports, and preparing draft biological and conference opinions.

INTRA-SERVICE SECTION 7 CONSULTATION OR CONFERENCE



* Mandatory for EIS-type projects and optional for non EIS-type projects
** Optional

(3) IS THE PROPOSED FEDERAL ACTION A MAJOR CONSTRUCTION ACTIVITY?

Major construction activities encompass dams, buildings, pipelines, roads, water resource developments, channel improvements, and other such projects that significantly modify the physical environment. As a rule of thumb, if an Environmental Impact Statement is required for the proposed action and construction-type impacts are involved, it is considered a major construction activity.

3.a. Major construction activity

For major construction activities, the Project Leader is required to request a species list from the ESO or submit a species list to the ESO for confirmation. When a species list is requested, the ESO has 30 days to respond. The species list is effective for 90 days. If listed, proposed, or category 1 candidate species are present, or suspected to be present, the Project Leader is required to begin a biological assessment. This assessment must be initiated within 90 days of receiving the list. It must be completed, along with a determination of the likely effects (if any) of the action, within 180 days; otherwise, the species list must be reverified.

If the Project Leader determines that a listed species or its habitat does not occur in the action area, or does not have the potential to occur, and if the ESO concurs in the determination, a biological assessment is not required and the section 7 process ends.

A biological assessment is not *required* if only proposed or category 1 candidate species are present: however, a biological assessment is *recommended* for these species, because an assessment will be required if the species is listed before or during implementation of the proposed action.

3.b. No major construction activity

Even if the action is not a major construction activity, consultation may be necessary. The Project Leader may initiate or continue informal consultation to determine if formal consultation is required. The Project Leader may submit a species list for confirmation or request a species list from the ESO. When the Project Leader determines that a listed species or its habitat does not occur or potentially occur in the action area, the section 7 process ends.

If a listed, proposed, or category 1 candidate species or its habitat is present, the Project Leader should determine whether the action "may affect" those species or habitat. Completing the **INTRA-SERVICE SECTION 7 BIOLOGICAL EVALUATION FORM** "Service Evaluation Form" (see Appendix B) will assist the Project Leader in determining the potential effect of the proposed action.

4. IS THERE A "MAY AFFECT" SITUATION?

The Service Evaluation Form or a biological assessment, as appropriate, is used for informal analysis of all actions affecting species subject to section 7. Review the instructions for this form for determinations of "no effect," "may affect," "is not likely to adversely affect," and "is likely to adversely affect."

In determining the potential effect of the action, the Project Leader needs to review enough information on the species and its habitat to assess whether the action may affect the species' population, reproductive capability, food supply, cover needs, pollinators, symbionts, predators/competitors, or other such biological factors. For designated or proposed critical habitat, the assessment should address the potential effect on important components of the critical habitat (some of which are identified as constituent elements) and the conservation role of the critical habitat unit.

When the Project Leader determines that the proposed action will have "no effect" on the listed, proposed, or category 1 candidate species or its habitat, the consultation process ends. Concurrence from the ESO is not required, but if the ESO is aware of and disagrees with the no effect determination, a memorandum outlining the disagreement and requesting continued consultation will be provided to the Project Leader. If a high level of sensitivity or controversy is associated with the action or the species, written concurrence from the ESO is recommended.

Project Leaders should use the informal consultation process whenever possible. The Service Evaluation Form should be completed for this purpose. As required of all other Federal agencies, the Service program (i.e., Refuges, Federal Aid, Ecological Services, Fisheries, Management Assistance, Endangered Species, etc.) that initiates a new action or continues an existing activity is responsible for obtaining the best scientific and commercial information available to complete the consultation. Much of the information may already be available through the ESO. The consultation may require surveys in the project area to determine species' presence and status, seasonal use pattern, condition of the species' habitat, juxtaposition to the action/activity, etc.

5. WHAT ARE THE OPTIONS FOR "MAY AFFECT" SITUATIONS?

When the Project Leader determines the action "may affect" a listed species, a designated or proposed critical habitat, or proposed or category 1 candidate species, the options are (1) to continue informal consultation with the ESO or (2) to initiate formal consultation or conference. The "may affect" evaluation looks not only at effects on the entire species or local management unit, but also considers the effect on individual members of the species. If even one individual may be affected, the biologist must conclude that there is a "may affect" situation. Project modifications agreed upon during informal consultation may result in a "no effect" determination, thus eliminating the need for formal consultation or conference.

When the Project Leader finds that the proposed action may affect, but is "not likely to adversely affect," listed, proposed, or category 1 candidate species, or designated or proposed critical habitats, a request for concurrence with that finding is sent to the appropriate ESO. The Project Leader can make such a finding only if all of the effects of the proposed action will be beneficial, insignificant, or discountable (see page 8). A copy of the Service Evaluation Form supporting the Project Leader's determination should be forwarded to the appropriate ESO within 30 days of that determination. The ESO will respond to the Project Leader's written request for concurrence within 30 days of receiving the request. Concurrence with the "not likely to adversely affect "finding completes the requirements for section 7 consultation. If any adverse effect or any incidental take of listed species or critical habitat is likely to occur, formal consultation must be initiated.

Section 7 consultation must be conducted prior to issuing permits for the incidental take of listed species, even for activities conducted during recovery efforts for these species. These permits must include appropriate conditions to avoid or minimize incidental take, and to ensure the disposition of any dead or injured specimens in a way that preserves their potential use in other recovery activities.

6. WHAT ARE THE PROCEDURES FOR FORMAL CONSULTATION OR FORMAL CONFERENCE?

Once an ESO receives a Project Leader's written request for a formal consultation or formal conference, this stage of the process will be concluded within 90 days. After the consultation or conference is concluded, a biological opinion or conference report will be delivered by the ESO within an additional 45 days. Extensions are available only by mutual agreement.

These timetables begin when the ESO receives a written request and enough information with which to proceed. The information can be provided by means of (1) a Service Evaluation Form, (2) a biological assessment, or (3) a report containing the following data: (a) a description of the proposed action; (b) a description of the specific area that may be affected; (c) a description of any listed, proposed, or category 1 candidate species, or any designated or proposed critical habitat, that may be affected; (d) a description of how the action may affect these species or habitats; (e) relevant reports, including any environmental impact statement, environmental assessment, or biological assessment prepared; (f) the cumulative effects in the action area; and (g) any other relevant information available. The ESO can assist in determining what type of data will be needed for the formal consultation or conference.

A biological opinion looks beyond the effects of the proposed action. It also considers the overall status of the species, and the environmental baseline and cumulative effects in the action area. Additionally, if incidental take is anticipated as a result of the proposed action, the incidental take statement that accompanies the biological opinion will lay out nondiscretionary reasonable and prudent measures to minimize that take, consistent with the requirements of sections 7(a)(2) and 7(b(4).

Draft biological opinions and conference reports will be forwarded by the ESO to the Regional Office Division of Endangered Species at least 2 weeks prior to the end of the 90-day consultation period. The Service Evaluation Form, along with other pertinent information, is transmitted with the draft biological opinion or conference report. The Project Leader is offered an opportunity to review the draft document when the draft determination is jeopardy and/or adverse modification, or when incidental take is anticipated. In these instances, it is beneficial to coordinate the development of reasonable and prudent alternatives and/or reasonable and prudent measures. If disagreements arise during this process, they can be elevated through the appropriate Assistant Regional Directors for resolution.

Consistent with current delegations of authority, Regional Directors sign intra-Service section 7 biological opinions and conference reports.

7. WHAT ARE THE OPTIONS IF A JEOPARDY/ADVERSE MODIFICATION OPINION IS RECEIVED?

If a final jeopardy or adverse modification biological opinion or conference opinion is issued, the Project Leader must notify the ESO of the final decision on the proposed action. The Project Leader has three options: (a) to implement the reasonable and prudent alternative(s) provided with the biological opinion; (b) to refrain from funding, approving, or undertaking the project; or (c) to apply for an exemption from section 7 of the ESA. The Service does not anticipate that an action proposed under its programs will ever justify an exemption application.

OTHER SERVICE CONSULTATION CONSIDERATIONS

The ESO preparing the draft biological opinion, draft conference report, or concurrence document will be separate from the office proposing the action, except for biological opinions required for section 10(a)(1)(B) permits, which are handled by separate organizational entities in the Regional Office's Division of Endangered Species.

Regional Office Divisions of Endangered Species have lead coordination responsibilities for national and interregional consultations. In addition, Regional Offices provide oversight of the consultation program for quality control. For expedience in processing consultations, a Service Project Leader may assume the lead responsibility for formal consultation in multi-agency actions if the Service's role is significant.

All Project Leaders have a continuing responsibility to determine if discretionary ongoing activities of the Service (no matter when the activities were initiated) comply with these guidelines and procedures.

Appendix A

EXAMPLES OF STEP-BY-STEP PROCEDURES FOR INTRA-SERVICE SECTION 7 CONCURRENCE, FORMAL CONSULTATION, AND CONFERENCE

A. Concurrence

Situation: The Division of Federal Aid (FA) receives a project proposal from a State. The project is eligible for funding under the Wildlife Restoration Grant Program.

Step:

1. FA requests a list of listed, proposed, and category 1 candidate species from the ESO. This request includes information on the specifics of the State request.

2. Within 30 days of receiving the request, ESO furnishes FA with a list of species that may be present in the action area.

3. Upon receipt of the species information, FA conducts a "may affect" analysis on listed, proposed, and category 1 candidate species.

4. A "may affect" determination is made; FA completes the Service Evaluation Form and determines the action "is not likely to adversely affect" the listed, proposed, or category 1 candidate species, and requests in writing that the ESO concur with this evaluation.

5. ESO responds within 30 days of receiving FA's request that there is concurrence, and therefore no need for formal intra-Service section 7 consultation.

6. If FA determines "no effect," a request for concurrence is unnecessary.

B. Formal Consultation

Situation: The Division of Fisheries (DF) receives a request from a State for an action.

Step:

1. DF requests a list of listed, proposed, and category 1 candidate species from the ESO. This request includes information on the specifics of the State request.

2. Within 30 days of receiving the request, the ESO furnishes DF with a list of species that may be present in the action area.

3. Upon receiving the species information, DF conducts a "may affect" analysis on listed, proposed, and category 1 candidate species that ESO said may be present.

4. DF concludes that the proposed action is likely to adversely affect listed species.

5. DF requests, in writing, initiation of formal section 7 consultation. A completed Service Evaluation Form is submitted with the request.

6. ESO acknowledges the request for formal section 7 consultation.

7. ESO prepares the draft biological opinion and submits to the ARD/ES for review.

8. The RD signs the biological opinion and forwards it to DF with a copy to the ARD/DF.

C. Conference

Situation: Refuges proposes an action in an area containing a proposed or category 1 candidate species.

Step:

1. Refuges requests a list of listed, proposed, and category 1 candidate species from the ESO. This request includes information on the specifics of the request.

2. Within 30 days of receiving the request, the ESO furnishes Refuges with a list of species that may be present in the action area.

3. Upon receiving the species information, Refuges conducts a "may affect" analysis on listed, proposed, and category 1 candidate species that ESO said may be present.

4. Refuges works with the ESO to assess whether or not their proposed action may jeopardize the continued existence of the proposed or category 1 candidate species. Refuges evaluates their proposal for its potential effect on the proposed or category 1 candidate species.

5. As a result of the evaluation, Refuges concludes their proposal is likely to jeopardize the proposed or category 1 candidate species.

Refuges requests conference with ESO on the Service Evaluation Form and asks for additional information.

6. The conference is held and ESO submits a draft conference report (the format follows that of a biological opinion issued through formal consultation) to the ARD/ES for review. The report contains advisory recommendations for minimizing or avoiding adverse effects.

7. The Regional Director signs the conference report and forwards it to Refuges with a copy to the ARD/Refuges. Refuges reviews the conference opinion and implements the actions that will avoid adverse effects to the proposed or category 1 candidate species.

Appendix B

INTRA-SERVICE SECTION 7 BIOLOGICAL EVALUATION FORM

[Note: This form provides the outline of information needed for consultation. If additional space is needed, attach additional sheets, or set up this form to accommodate your responses.]

Originating Person: _____
Telephone Number: _____
Date: _____

I. Region:

II. Service Activity (Program)

III. Pertinent Species and Habitat:

A. Listed species and/or their critical habitat within the action area:

B. Proposed species and/or proposed critical habitat within the action area

C. Category 1 candidate species within the action area:

D. Include species/habitat occurrence on a map.

IV. Geographic area or station name and action:

V. Location (attach map):

A. County and State:

B. Section, township, and range (or latitude and longitude):

C. Distance (miles) and direction to nearest town:

VI. Description of proposed action (attach additional pages as needed):

VII. Determination of effects:

A. Explanation of effects of the action on species and critical habitats in items III. A, B, and C (attach additional pages as needed):

B. Explanation of actions to be implemented to reduce adverse effects:

VIII. Effect determination and response requested: [* optional]

A. Listed species/critical habitat:

Determination	Response requested
no effect (species: _____)	___*Concurrence
is not likely to adversely affect (species: _____)	___Concurrence ___*Formal Consultation
is likely to adversely affect (species: _____)	___Formal Consultation

B. Proposed species/proposed critical habitat:

Determination	Response requested
no effect (species: _____)	___*Concurrence
is not likely to adversely affect (species: _____)	___ Concurrence
is likely to adversely affect (species: _____)	___Informal conference
is likely to jeopardize/adverse modification of critical habitat (species: _____)	___Conference

C. Category 1 candidate species:

Determination	Response requested
no effect (species: _____)	___*Concurrence
is not likely to adversely affect (species: _____)	___ Concurrence
is likely to adversely affect (species: _____)	___Informal conference
is likely to jeopardize (species: _____)	___Conference

IX. Reviewing ESO Evaluation:

A. Concurrence _____ Nonconcurrence _____

B. Formal consultation required _____

C. Conference required _____

D. Remarks (attach additional pages as needed):

_____ _____
signature date
[Title/office of reviewing official]

INSTRUCTIONS

Originating Person: The person(s) who prepared the Intra-Service Section 7 Biological Evaluation Form.

Date: Date the information on the form was finalized.

I Region: Self-explanatory.

II Service activity: The Service program initiating the proposed action.

III Pertinent species and habitat.

(A) Listed species and/or their critical habitat within the action area: The action area includes the immediate area where the proposed action will occur, as well as any other areas where direct or indirect impacts of the action may be expected. For example, effects of an action in the headwaters of a stream may affect endangered fish that occur 20 miles downstream. A compilation of listed species or critical habitats that possibly occur in the action area may be generated by the Project Leader, or it may be requested from the appropriate ESO.

Note: All experimental populations of listed species are treated as threatened species. However, for the purposes of section 7 consultation, they are treated as species *proposed* for listing if they occur off National Wildlife Refuge or National Park System lands and they are classed as "non-essential" experimental populations.

List all threatened and endangered species and critical habitat that will or may be affected by the proposed action. <u>An effect exists even if only one individual or habitat segment may be affected.</u> Consider both beneficial and adverse effects, regardless of their magnitude.

It is necessary to list all threatened and endangered species and critical habitats in the action area that will not be affected at any level of significance. This informs the reviewer that such species have been considered.

(B) Proposed species and/or proposed critical habitat within the action area: Lists of proposed species and critical habitat that could occur in the action area may be generated by the project leader or may be requested from the appropriate ESO.

List all species and habitats in the action area for which a proposed listing rule (but not a final rule) or proposed critical habitat designation has been published in the <u>Federal Register</u>. The list should include not only proposed species that may be affected, but also those that will not be affected. Use the same consideration as in Item III (A) above.

(C) Category 1 candidate species within the action area: Lists of candidate species that could occur in the action area may be generated by the project leader or may be requested from the appropriate ESO.

List all category 1 species that may be affected by the proposed action. Because listing candidates may be added to, or dropped from, category 1 between the typically biannual printings of the Notice of Review, it is necessary to check candidate lists with the appropriate ESO.

Include in the list of category 1 species in the action area those that will not be affected by the proposed action.

IV Geographic area or station name and action:

Briefly describe the proposed action and where it will occur. (For example: The proposed action is to directly stock, or transfer to the State of X for stocking, channel catfish and smallmouth bass. These stockings would occur in both Blue Water and Minnow River drainages). A more detailed description of the proposed action will be presented under Section VI.

V Location (attach map):

In addition to the following four specific descriptions, it is vital to attach a map(s). The reviewer may not be familiar with the project area and will need the maps to precisely relate the proposed project to the affected species. Maps should depict, preferably in large scale, the exact locations of project elements. The maps should include section, township, and range, or latitude and longitude. Topographic maps are preferred, with the action area depicted on them.

(A) County and State: Self-explanatory.

(B) Section, township, and range (or latitude and longitude):

Locate the project area as precisely as possible. If the action is stocking a small stock tank, the descriptor should include at least quarter section and preferably quarter/quarter section. For scattered project sites, such as in fish stocking, a location should be given for each site.

(C) Distance (miles) and direction to nearest town: Self- explanatory.

(D) Species/habitat occurrence: Depict on the location map the species and habitat occurrences.

VI Description of proposed action:

What is the purpose of this proposed action and how do you plan to

accomplish it? Describe the project area as well as the project. These descriptions should be detailed enough so that the reviewer can fully understand what the components of the action include and how the project will affect the species of concern. Do not assume that the reviewing office will understand procedures that are taken for granted within your program. Details can be provided here, or by attaching copies of project plans, management plans, stocking schedules, or other project documents. National Environmental Protection Act documents are usually helpful attachments. Sketches or blueprints of the proposed action should be attached. Proposed project dates should be provided. Attach a biological assessment if the project is considered a "major construction activity." Include any measures agreed to through informal consultation to reduce any adverse impacts.

VII Determination of effects

(A) Explanation of effects of the action:

Discuss either the effects of the action on each listed, proposed, or candidate species and critical habitat in the action area, or why those species or critical habitats will not be affected. For species or critical habitats affected by the proposed action, provide the following information: [Note: Candidate species will have no proposed critical habitat.]

(1) Status of species in action area; is it native (natural and/or stocked) or non-native in the action area? Include population and/or distribution trends (provide survey information).

(2) Species habitat in the action area and its significance to spawning, feeding, migratory habits (or behavior), cover, roost, etc. Is the area currently occupied or unoccupied historic range for the species?

(3) Impacts of the proposed action on species and/or critical habitat, including direct, indirect, interdependent, interrelated, and cumulative impacts.

(4) Quantification of effects - acres of habitat, miles of habitat, number of individuals, etc.

(5) Summary of effects - include the basis for your conclusion - best judgment, literature, citations, studies, etc.

(B) Describe, if known, project modifications that would promote the conservation of the affected species. Project modification ideas may be found in recovery plans. Although section 7 of ESA prohibits only those actions by Federal agencies which are likely to jeopardize listed species or adversely modify critical habitat,

the Service has a commitment to recovering listed species and trying to prevent the need to list more species.

VIII. Effect determination and response requested:

Enter the species in the appropriate determination. For each determination, place an X on the response requested.

(A) Listed species/critical habitat:

No effect. This conclusion is reached if the proposed action and its interrelated and interdependent actions will not directly or indirectly affect listed species or critical habitat. Formal section 7 consultation is not required when the no effect conclusion is reached. A request for the optional written concurrence is encouraged.

Is not likely to adversely affect. This conclusion is appropriate when effects to the species or critical habitat are expected to be beneficial, discountable, or insignificant. Beneficial effects have contemporaneous positive effects without any adverse effects to the species or habitat. Insignificant effects relate to the size of the impact (and should never reach the scale where take occurs), while discountable effects are those that are extremely unlikely to occur. Based on best judgment, a person would not: (1) be able to meaningfully measure, detect, or evaluate insignificant effects; or (2) expect discountable effects to occur. If the ESO concurs in writing with the Project Leader's determination of "is not likely to adversely affect" listed species or critical habitat, the section 7 consultation process is completed.

If formal section 7 consultation is required for other species affected by this proposed action, then it may be easier and less confusing to fold the "is not likely to adversely effect" concurrence into the formal section 7 consultation rather than doing a separate concurrence.

Is likely to adversely affect. This conclusion is reached if any adverse effect to listed species or critical habitat may occur as a direct or indirect result of the proposed action or its interrelated or interdependent actions. In the event the overall effect of the proposed action is beneficial to the listed species or critical habitat, but may also cause some adverse effect on individuals of the listed species or segments of the critical habitat, then the determination should be "is likely to adversely affect." Such a determination requires formal section 7 consultation.

Example: A refuge proposes prescribed burning for a prairie remnant to improve the habitat for the endangered Karner blue butterfly. The burn will substantially improve the habitat for the species and promote its recovery in subsequent years. However, individual Karner blue butterfly eggs and larvae will be

killed during the burn. Even though the net effect of the burn will be highly beneficial to the listed species, the burn must be considered to have an adverse effect. A finding of "is likely to adversely affect" is necessary.

(B) Proposed species/proposed critical habitat:

No effect. This conclusion is appropriate for a proposed species or proposed critical habitat when no effects are expected. A request for optional written concurrence is encouraged.

Is not likely to adversely affect. This conclusion is appropriate when all effects on a proposed species or proposed critical habitat are expected to be beneficial, discountable, or insignificant. Beneficial effects have contemporaneous positive effects without any adverse effects to the species or habitat. Insignificant effects relate to the size of the impact (and should never reach the scale where take occurs), while discountable effects are those that are extremely unlikely to occur. Based on best judgment, a person would not: (1) be able to meaningfully measure, detect, or evaluate insignificant effects; or (2) expect discountable effects to occur. Written concurrence is recommended.

Is likely to adversely affect. This conclusion is reached if any adverse effects on proposed species or critical habitat may occur as a result of the direct or indirect effects of the proposed action or its interrelated or interdependent actions. In the event the overall effect of the proposed action is beneficial to proposed species or proposed critical habitat, but may also cause some adverse effect on individuals of the proposed species or segments of the proposed critical habitat, then the determination should be "is likely to adversely affect." Such a finding does not require a conference, but discussion with the appropriate ESO is encouraged. This provides an informal opportunity to suggest ways in which the adverse effects can be minimized.

Is likely to jeopardize proposed species/adversely modify proposed critical habitat. For proposed species and proposed critical habitats, the Service is required to evaluate whether the action being considered is likely to jeopardize the proposed species or adversely modify the proposed critical habitat. If this conclusion is reached, a section 7 conference is required. For additional guidance on what constitutes jeopardy to a proposed species and adverse modification of proposed critical habitat, see the definition section or contact the appropriate ESO.

(C) Category 1 candidate species:

No effect. This conclusion is reached if the proposed action and its

interrelated and interdependent actions will not directly or indirectly affect category 1 candidate species. A request for the optional written concurrence is encouraged.

Is not likely to adversely affect. This conclusion is appropriate when all effects on a category 1 candidate are expected to be beneficial, discountable, or insignificant. Beneficial effects have contemporaneous positive effects without any adverse effects to the species or habitat. Insignificant effects relate to the size of the impact (and should never reach the scale where take occurs), while discountable effects are those that are extremely unlikely to occur. Based on best judgment, a person would not: (1) be able to meaningfully measure, detect, or evaluate insignificant effects; or (2) expect discountable effects to occur. Written concurrence is recommended.

Is likely to adversely affect. This conclusion is reached if any adverse effects on the category 1 candidate may occur as a result of the direct or indirect effects of the proposed action or its interrelated or interdependent actions. In the event the overall effect of the proposed action is beneficial to the category 1 candidate species, but may also cause some adverse effect on individuals of the species, then the finding should be "is likely to adversely affect." This finding does not require a conference, but discussion with the appropriate ESO is encouraged. This will provide an informal opportunity to suggest ways in which the adverse effects can be minimized.

Is likely to jeopardize proposed category 1 candidate species. For category 1 candidate species, the Service is required to evaluate whether the proposed action is likely to jeopardize the category 1 candidate species. If this conclusion is reached, a section 7 conference is required. For guidance on what constitutes jeopardy to a category 1 candidate species, see the definitions section or contact the appropriate ESO.

APPENDIX F

GENERAL INSTRUCTIONS TO BE FOLLOWED BY EPA PERSONNEL* UPON DISCOVERY OF A SICK OR INJURED OR DEAD LISTED SPECIES

The primary objective in handling a sick or injured specimen is effective treatment and care. The primary objective when encountering a dead specimen is to preserve biological materials in the best possible state for later analysis of cause of death; preserving biological materials is also preserving evidence. In conjunction with treatment of sick or injured animals, the finder has a responsibility to ensure that evidence extrinsic to the specimen is not unnecessarily disturbed. Therefore, upon locating a dead injured or sick endangered or threatened species specimen:

1. Contact a wildlife law enforcement agent immediately. DO NOT disturb the scene or the carcass (if the specimen is dead). It is preferable to contact a Service agent, but if one is not immediately available, a State agent should be contacted. The law enforcement agent will need to make a determination as to whether or not legal action should be taken. Specifically request instructions on handling the sick/injured or dead specimen in order to effectively treat or preserve it. Strictly follow all instructions provided by the agent.

2. In cooperation with the wildlife enforcement agent, contact either: (a) the National Wildlife Health Research Center (NWHR) in Madison, Wisconsin at (608) 271-4640 for vertebrates other than fish; (b) the National Fisheries Research Center - Leetown in Kearneysville, West Virginia at (304) 725-8461 for fish; or (c) for invertebrates and plants contact the appropriate Fish and Wildlife Service Field or Regional Office specified in the biological opinion. You will be provided with specific guidance regarding care preservation and shipment for postmortem evaluations. General Instructions are provided in Attachment 1. Additional detail is available in Fish and Wildlife Service Resource Publication 161, "Field Guide to Wildlife Diseases." However, SPECIFIC INSTRUCTIONS MAY VARY DEPENDING ON THE CIRCUMSTANCES INVOLVED.

   In general, it is important to contain a dead specimen in a plastic bag and chill it as soon after discovery as possible by the use of refrigeration, blue ice packs or wet ice. If delays of more than 24 hours are anticipated in shipping the carcass, it should be frozen immediately.

3. Field observations and data are important for guiding cause of death or sickness investigations. As complete a case history as possible should accompany each report. Information should include location, proximity to manmade structures (roads, powerlines, fences, etc.), information on pesticides used in the vicinity (name, formulation, date when last applied, conditions during and after last application, etc.), presence of any specimens of nonlisted species, and other

pertinent information such as that identified in Attachment 2. Necropsy findings and evaluation of the case history will determine whether chemical analysis should be performed.

4. Inform the appropriate Fish and Wildlife Service Field or Regional Office of the incident as specified in the biological opinion.

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* The handling of a listed species requires a Federal endangered species permit except for employees or agents of a State conservation agency or a Federal land management agency who are acting in an official capacity.

Attachment 1

SPECIMEN SHIPMENT

National Wildlife Health Research Center

1. Call the Center at (608) 271-4640 to determine type and number of specimens needed, preservation of specimens during shipment, and when they should be shipped. Your call will be responded to by a member of the Resource Health Team.

2. Label each specimen, double-bag it, and place it in a styrofoam cooler lined with a plastic bag. Frozen specimens generally do not require ice; they will remain frozen for up to 24 hours if the volume is large enough (i.e., six frozen mallards in one cooler will not require ice, but one frozen mallard will). Always use refrigerant with fresh specimens or intersperse with frozen specimens.

3. Blue ice packs are usually the best refrigerant to use. Block ice or cubes must be properly bagged to prevent leakage. When ice packs are used, intersperse them among specimens and fill in empty space in cooler with newspaper.

4. Close the plastic bag lining the cooler and seal the lid with strapping tape.

5. Tape specimen data sheet and history, contained in an envelope within a plastic bag, to the top of the cooler.

6. Place the styrofoam cooler in a cardboard box and seal the lid with strapping tape.

7. Address cardboard box to:
   National Wildlife Health Research Center
   6006 Schroder Road
   Madison, Wisconsin 53711
   [Include return address on outside of box.]

8. Write "Diagnostic Specimens (Wildlife)" on outside of cardboard box.

9. Ship on a carrier that can get the package to the Center within 24 hours. Air freight or U.S. Postal Express mail are usually preferred; check prices. Overnight delivery services (DHL, Federal Express, Purolator, or Emery) can also be used but may be significantly more expensive.

10. Call the Center with an airbill number, carrier used, and estimated time of arrival in Madison.

Attachment 2

Supplemental Information to be Provided with Carcass Submissions*

Species
Number Submitted
Date
Contact name
Address and Phone Number
Affiliation

Location
County
State
Others with knowledge of this event that could be contacted for further information.

How many sick or dead animals have been found?
Are other species involved? If so identify them
When did sick or dead animals first appear?
What are the physical conditions of the diseased animals? (fresh decomposed emaciated etc.)
What clinical signs (symptoms) have been observed?
What are the age and sex of the animals involved?
Are the carcasses concentrated or dispersed?
Are the animals dying quickly or slowly?
Is there evidence of struggling?
How large an area is involved?
What is the general vegetative composition of the area?
What are the habitat conditions?
What are the major water supplies?
What are the major food supplies?
What were the climatic conditions prior to the problem?
Have there been any unusual changes on the area recently? If so what?
Are there livestock/poultry or domestic animals on or adjacent to the area?
What is the proximity of carcasses to human activities (agriculture mining. etc.) and manmade structures (fences roads power lines train tracks etc.)
What pesticides (and formulations) have been used in the vicinity and when and how (aerial ground) were they last applied?

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* Provide information to as many of these questions as possible.

APPENDIX G - SERVICE/NMFS FIELD OFFICES HANDLING SECTION 7

June 21, 1994

Fish & Wildlife Service Regional, Field, and State Offices
handling endangered species consultations

Region 1: CA, HI, ID, NV, OR, WA, Pacific

Regional Director
U.S. Fish and Wild'ife Service
911 NE 11th Avenue
Portland, Oregon 97232-4181

Telephone: 503-231-6118
Fax: 503-231-2122

Field Supervisor
U.S. Fish and Wildlife Service
2800 Cottage Way, Room E-1803
Sacramento, California 95825

Telephone: 916-978-4613/4866
Fax : 916-978-4619

Field Supervisor
U.S. Fish and Wildlife Service
2140 Eastman Avenue, Suite 100
Ventura, California 93003

Telephone: 805-644-1766
Fax: 818-904-6288

Field Supervisor
U.S. Fish and Wildlife Service
4696 Overland Road, Room 576
Boise, Idaho 83705

Telephone: 208-334-1931
Fax: 208-334-9493

Field Supervisor
U.S. Fish and Wildlife Service
4600 Kietzke Lane, Suite C-125
Reno, Nevada 89502-5093

Telephone: 702-784-5227
Fax: 702-784-5870

Field Supervisor
U.S. Fish and Wildlife Service
2730 Loker Avenue West
Carlsbad, California 92008

Telephone: 619-431-9440
Fax: 619-431-9624

Field Supervisor
U.S. Fish and Wildlife Service
300 Ala Moana Blvd., Room 6307
P.O. Box 50167
Honolulu, Hawaii 96850

Telephone: 808-541-2749
Fax: 808-541-2756

Field Supervisor
U.S. Fish and Wildlife Service
1201 Ironwood Drive
Coeur d' Alene, Idaho 83814

Telephone: 208-765-7261
Fax: 208-765-7307

Field Supervisor
U.S. Fish and Wildlife Service
2600 S.E. 98th Avenue, Suite 100
Portland, Oregon 97266

Telephone: 503-231-6179
Fax: 503-231-6195

Field Supervisor
U.S. Fish and Wildlife Service
3704 Griffin Lane SE, Suite 102
Olympia, Washington 98501-2192

Telephone: 206-753-9440
Fax: 206-753-9008

Region 2: AZ, NM, OK, TX

Regional Director
U.S. Fish and Wildlife Service
500 Gold Avenue S.W.
P.O. Box 1306
Albuquerque, New Mexico 87103

Telephone: 505-766-2321
Fax: 505-766-2105

Field Supervisor
U.S. Fish and Wildlife Service
3616 West Thomas Road, Suite 6
Phoenix, Arizona 85019

Telephone: 602-379-4720
Fax: 602-379-6629

Field Supervisor
U.S. Fish and Wildlife Service
222 South Houston, Suite A
Tulsa, Oklahoma 74127-8909

Telephone: 918-581-7458
Fax: 918-581-7467

Field Supervisor
U.S. Fish and Wildlife Service
611 E. 6th Street, Suite 407
Austin, Texas 78701

Telephone: 512-482-5436
Fax: 512-482-5442

Field Supervisor
U.S. Fish and Wildlife Service
17629 El Camino Real, Suite 211
Houston, Texas 77058

Telephone: 713-286-8282
Fax: 713-488-5882

Field Supervisor
U.S. Fish and Wildlife Service
3530 Pan Am Highway, NE, Suite D
Albuquerque, New Mexico 87107

Telephone: 505-883-7877
Fax: 505-883-7876

Field Supervisor
U.S. Fish and Wildlife Service
Stadium Centre Building
711 Stadium Drive East, Suite 252
Arlington, Texas 76011

Telephone: 817-885-7830
Fax: 817-885-7835

Field Supervisor
U.S. Fish and Wildlife Service
Corpus Christi State University
Room 118, Old Science Hall
6300 Ocean Drive, Campus Box 338
Corpus Christi, Texas 78412

Telephone: 512-994-9005
Fax: 512-994-8262

Region 3: IA, IL, IN, MI, MN, MO, OH, WI

Regional Director
U.S. Fish and Wildlife Service
Federal Building
1 Federal Drive
Fort Snelling, Minnesota 55111-4056

Telephone: 612-725-3563
Fax: 612-725-3502

Field Supervisor
U.S. Fish and Wildlife Service
1000 Hart Road, Suite 180
Barrington, Illinois 60010

Telephone: 708-381-2253
Fax: 708-381-2285

Field Supervisor
U.S. Fish and Wildlife Service
718 North Walnut Street
302
Bloomington, Indiana 47404
5202

Telephone: 812-334-4261
Fax: 812-334-4273

Field Supervisor
U.S. Fish and Wildlife Service
4101 E. 80th Street

Bloomington, Minnesota 54425-1665

Telephone: 612-725-3548
Fax: 612-725-3609

Field Supervisor
U.S. Fish and Wildlife Service
6950-H Americana Parkway
Reynoldsburg, Ohio 43068

Telephone: 614-469-6923
Fax: 614-469-6919

Field Supervisor
U.S. Fish and Wildlife Service
4469 48th Avenue Court
Rock Island, Illinois 61201

Telephone: 309-793-5800
Fax: 309-793-5804

Field Supervisor
U.S. Fish and Wildlife Service
1405 South Harrison Road, Room

East Lansing, Michigan 48823-

Telephone: 517-337-6650
Fax: 517-337-6899

Field Supervisor
U.S. Fish and Wildlife Service
608 E. Cherry Street, Room 200

Columbia, Missouri 65201

Telephone: 314-876-1911
Fax: 314-876-1914

Field Supervisor
U.S. Fish and Wildlife Service
1015 Challenger Court
Green Bay, Wisconsin 54311-8331

Telephone: 414-433-3803
Fax: 414-433-3882

Region 4: AL, FL, GA, kY, LA, MS, NC, PR, SC, GA

Regional Director
U.S. Fish and Wildlife Service
Richard B. Russell Federal Bldg.
75 Spring Street, SW, Suite 1276
Atlanta, Georgia 30303

Telephone: 404-679-7103
Fax: 404-730-2917

Field Supervisor
U.S. Fish and Wildlife Service
P.O. Drawer 1190
Highway 98, Daphne East Plaza
Daphne, Alabama 36526

Telephone: 205-441-5181
Fax: 205-441-6222

Field Supervisor
U.S. Fish and Wildlife Service
1360 U.S. Highway 1, Suite 5
Vero Beach, Florida 32960

Telephone: 407-562-3909
Fax: 407-562-4288

Field Supervisor
U.S. Fish and Wildlife Service
825 Kaliste Saloom
Brandywine II, Suite 102
Lafayette, Louisiana 70508

Telephone: 318-264-6630
Fax: 318-264-6663

Field Supervisor
U.S. Fish and Wildlife Service
551-F Pylon Dr.
Raleigh, North Carolina 27606

Telephone: 919-856-4520
Fax: 919-856-4556

Field Supervisor
U.S. Fish and Wildlife Service
6620 Southpoint Dr., South
Suite 310
Jacksonville, Florida 32216

Telephone: 904-232-2580
Fax: 904-232-2404

Field Supervisor
U.S. Fish and Wildlife Service
801 Gloucester Street
Federal Building, Rm 334
Brunswick, Georgia 31520

Telephone: 912-265-9336
Fax: 912-265-1061

Field Supervisor
U.S. Fish and Wildlife Service
6578 Dogwood View Parkway, Suite A
Jackson, Mississippi 39213

Telephone: 601-965-4900
Fax: 601-965-4340

Field Supervisor
U.S. Fish and Wildlife Service
P.O. Box 491
Boqueron, Puerto Rico 00622

Telephone: 809-851-7297
Fax: 809-851-7440

Field Supervisor
U.S. Fish and Wildlife Service
P.O. Box 12559, 217 Ft. Johnson
Charleston, South Carolina 29412

Telephone: 803-724-4707
(disconnected)

Field Supervisor
U.S. Fish and Wildlife Service
446 Neal Street
Cookeville, Tennessee 38501

Telephone: 615-528-6481
Fax: 615-528-7075

Region 5: CN, DE, MA, MD, ME, NH, NJ, NY, PA, RI, VA, VT, WV

Regional Director
U.S. Fish and Wildlife Service
300 Westgate Center Drive
Hadley, MA 01035-9589

Telephone: 413-253-8300
Fax: 413-253-8456

Assistant Field Supervisor
U.S. Fish and Wildlife Service
1033 South Main Street
Old Town, Maine 04468

Telephone: 207-827-5938
Fax: 207-827-6099

Field Supervisor
U.S. Fish and Wildlife Service
Ralph Pill Marketplace, 4th Floor
22 Bridge Street
Concord, New Hampshire 03301-4901

Telephone: 603-225-1411
Fax: 603-225-1467

Field Supervisor
U.S. Fish and Wildlife Service
3817 Luker Road
Cortland, New York 13045

Telephone: 607-753-9334
Fax: 607-753-9699

Field Supervisor
U.S. Fish and Wildlife Service
P.O. Box 480
Mid County Center
U.S. Route 17, Box 480
White Marsh, Virginia 23183

Telephone: 804-693-6694
Fax: 804-693-9032

Field Supervisor
U.S. Fish and Wildlife Service
177 Admiral Cochrane Drive
Annapolis, Maryland 21401

Telephone: 410-269-5448
Fax: 410-269-0832

Field Supervisor
U.S. Fish and Wildlife Service
927 North Main St. Bldg. D-1
Pleasantville, New Jersey 08232

Telephone: 609-646-9310
Fax: 609-646-0352

Field Supervisor
U.S. Fish and Wildlife Service
315 South Allen St., Suite 322
State College, Pennsylvania 16801

Telephone: 814-234-4090
Fax: 814-234-0748

Field Supervisor
U.S. Fish and Wildlife Service
Rte. 250 South, Elkins Shopping Plaza
P.O. Box 1278
Elkins, West Virginia 26241

Telephone: 304-636-6586
Fax: 304-636-7824

Region 6: CO, KS, MT, NE, ND, SD, UT, WY

(Street address)

(134 Union Blvd., 4th Floor)
(Lakewood, Colorado 80228)

Regional Director
U.S. Fish and Wildlife Service
P.O. Box 25486
Denver Federal Center
Denver, Colorado 80225

Telephone: 303-236-7920
Fax: 303-236-6958

State Supervisor
U.S. Fish and Wildlife Service
730 Simms Street, Suite 290
Golden, Colorado 80401-4720

Telephone: 303-231-5280
Fax: 303-231-5285

Field Supervisor
U.S. Fish and Wildlife Service
100 North Park, Suite 320
Helena, Montana 59601

Telephone: 406-449-5322
Fax: 406-449-5339

Field Supervisor
U.S. Fish and Wildlife Service
1500 Capital Avenue
Bismarck, North Dakota 58501-2096

Telephone: 701-250-4402
Fax: 701-250-4400

Field Supervisor
U.S. Fish and Wildlife Service
Lincoln Plaza, Suite 404
145 East 1300 South
Salt Lake City, Utah 84115

Telephone: 801-524-5001
Fax: 801-524-5021

State Supervisor
U.S. Fish and Wildlife Service
315 Houston Street, Suite E
Manhattan, Kansas 66502-6172

Telephone: 913-539-3474
Fax: 913-539-8567

Field Supervisor
U.S. Fish and Wildlife Service
203 West Second Street
Grand Island, Nebraska 68801-5907

Telephone: 308-382-6468
Fax: 308-384-8835

State Supervisor
U.S. Fish and Wildlife Service
420 South Garfield Avenue, Suite 400
Pierre, South Dakota 57501-5408

Telephone: 605-224-8693
Fax: 605-224-9974

State Supervisor
U.S. Fish and Wildlife Service
4000 Morrie Avenue
Cheyenne, Wyoming 82001

Telephone: 307-772-2374
Fax: 307-772-2358

Region 7: AK

Regional Director
U.S. Fish and Wildlife Service
1011 East Tudor Road
Anchorage, Alaska 99503

Telephone: 907-786-3542
Fax: 907-786-3350

Field Supervisor
U.S. Fish and Wildlife Service
605 West 4th Avenue, Room G-62
Anchorage, Alaska 99501

Telephone: 907-271-2888
Fax: 907-271-2786

Field Supervisor
U.S. Fish and Wildlife Service
101 12th Avenue, Box 19, Rm 232
Fairbanks, Alaska 99701

Telephone: 907-456-0203
Fax: 907-456-0208

Field Supervisor
U.S. Fish and Wildlife Service
P.O. Box 21287
Juneau, Alaska 99802-1287

Telephone: 907-586-7240
Fax: 907-586-7154

NATIONAL MARINE FISHERIES SERVICE

REGIONAL OFFICES

Northeast Region
National Marine Fisheries Service
One Blackburn Drive
Gloucester, Massachusetts 09130-2298
COMM: 508/281-9250
FAX: 508/281-9371

Connecticut, Delaware, District of Columbia, Illinois, Indiana, Maine, Maryland, Massachusetts, Michigan, Minnesota, New Hampshire, New Jersey, New York, Ohio, Pennsylvania, Rhode Island, Vermont, West Virginia, Wisconsin.

Southeast Region
National Marine Fisheries Service
9450 Koger Boulevard, Room 206
St. Petersburg, Florida 33702
COMM: 813/893-3141
FAX: 813/893-3111

Alabama, Arkansas, Florida, Georgia, Iowa, Kansas, Kentucky, Louisiana, Mississippi, Missouri, Nebraska, New Mexico, North Carolina, Oklahoma, Puerto Rico, South Carolina, Tennessee, Texas, Virgin Islands.

Southwest Region
National Marine Fisheries Service
501 W. Ocean Boulevard, Suite 4200
Long Beach, California 90802-4213
COMM: 310/980-4001
FAX: 310/980-4018

American Samoa, Arizona, California, Guam, Hawaii, Nevada, Trust Territories of the Pacific Islands.

Northwest Region
National Marine Fisheries Service
7600 Sand Point Way, N.E.
BINC15700 Building 1
Seattle, Washington 98115-0070
COMM: 206/526-6150
FAX: 206/526-6426

Colorado, Idaho, Montana, North Dakota, Oregon, South Dakota, Utah, Washington, Wyoming

Alaska Region
National Marine Fisheries Service
Federal Building Annex, Suite 6
9109 Mendenhall Mall Road
Juneau, Alaska 99802-1668
COMM: 907/586-7221
FAX: 907/586-7249

Alaska

APPENDIX H - EXEMPTION PROCESS

1. Who can initiate the exemption process

Following completion of formal consultation, the Federal agency, the Governor of the State in which the action is proposed, or the permit or license applicant may initiate the exemption process. A "permit or license applicant" is defined by ESA as the person whose application to a Federal agency for a permit or license has been denied primarily because of the application of section 7(a) to that agency action.

Within the Department of the Interior, the exemption process is administered by the Assistant Secretary for Policy, Management and Budget, rather than the Service.

2. Prerequisites for consideration

In order to be accepted for consideration, an application must satisfy the following conditions. The Federal agency and the applicant must have:

- carried out the consultation responsibilities in good faith and made a reasonable and responsible effort to develop and fairly consider modifications or reasonable and prudent alternatives to the proposed action;

- conducted any required biological assessment; and

- refrained from making any irreversible or irretrievable commitment of resources during consultation.

3. Exemption process

An application for exemption is filed within 90 days of completion of consultation (for Federal agencies) or within 90 days of completion of the agency's final action on the permit or license (for non-Federal applicants).

The Secretary of the Interior (or Commerce) conducts a threshold review of the application to determine whether the prerequisites for consideration have been met (20 days).

The appropriate Secretary then holds a formal hearing on the application. The Secretary submits a report to the Committee within 140 days of the threshold determination, discussing:

- the availability of reasonable and prudent alternatives, the nature and extent of benefits of the agency action, and alternative courses of action consistent with conservation of the species or critical habitat;

- a summary of evidence concerning whether the agency action is in the public interest and is of national or regional significance;

- appropriate reasonable mitigation and enhancement issues to be considered by the Committee; and

- whether the agency and applicant refrained from making any irreversible or irretrievable commitment of resources during consultation.

The Committee makes its final determination within 30 days of receipt of the report.

4. Potential outcomes

There is little administrative history reflecting the likely outcome of the Committee's review. To date only three cases have completed the entire review process:

- Tellico Dam posed jeopardy to the snail darter. The Committee voted 7 to 0 not to grant an exemption. [An Appropriations Act rider subsequently allowed the dam to be completed.]

- Grayrocks Dam on the Platte River posed jeopardy to the whooping crane. An exemption was granted, but the Committee required that the agency adopt the reasonable and prudent alternative that had been determined in the biological opinion.

- BLM timber sales in Oregon posed jeopardy to the northern spotted owl. An exemption was granted for 13 of 44 sales covered by the application. The 13 exempted sales were subject to a mitigation measure requiring BLM to implement the recovery plan for the owl as expeditiously as possible. The remaining sales remain subject to the reasonable and prudent alternatives provided in the biological opinion. This Committee action was subject to litigation on the basis of infringement of the Administrative Procedure Act during the deliberations of the Committee. The application was subsequently withdrawn.

Three other applications were withdrawn by the applicant prior to Committee review.

- Pittston (oil refinery in Maine) was enjoined from further action on the proposal by related Court action and dropped their application;

- an application filed relative to dredging in the Suwannee River was withdrawn when it was determined that the contractor filing the request did not represent the applicant involved: and

- a barge fleeting permit on the Ohio River was withdrawn by the applicant prior to the public hearing.

The Committee must grant an exemption if the Secretary of Defense finds it is necessary for reasons of national security, and the President may grant an exemption to restore public facilities in declared natural disaster areas under certain circumstances.

An exemption cannot be granted if the Secretary of State finds that such an action would be a violation of an international treaty or other obligation of the United States.

END

05/22/95